No. 17-1702

In the Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, & CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK & JESUS PAPOLETO MELENDEZ,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

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GLOSSARY

CAO	Community Access Organization
MNN	Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network
PEG	Public, Educational, and Government

BRIEF FOR RESPONDENTS

INTRODUCTION

New York (unlike most states) has chosen to configure its public access television channels as public forums. The administration of a public forum is a traditional and exclusive public function. As a result, in New York, the government-selected administrator of a government-controlled public access channel is subject to the First Amendment.

First, state and local governments have discretionary authority to designate places as public forums. They do so by intentionally opening a place for individuals to speak. In a public forum, the administrator generally lacks editorial discretion, and the First Amendment protects access to the forum.

New York has structured its public access channels as public forums. By requiring them to operate on a free, first-come, first-served basis, New York precludes its channels from exercising editorial control. Most other states, however, have made a different choice; they allow public access channels to curate content. Those channels are not public forums.

Second, the Constitution governs the performance of traditional and exclusive public functions. Administering a public forum—a task limited to a sovereign or its delegee—is one such function. If a City empowers a nonprofit to serve as gatekeeper to a park or after-hours public classroom space, the First Amendment still applies. The same is true for administering the public forums that are Manhattan's public access channels.

Our position is consistent with private property rights. The City of New York—*not MNN*—owns and controls Manhattan's public access channels. The City created these channels through its franchise agreements, and the City selected MNN to administer them. Critically, the City retains complete discretion to remove MNN as administrator and replace it. MNN performs its administrative role solely at the pleasure of the City. The public access channels are therefore not private in any relevant sense.

The reach of this case is narrow. It does not address public access television where there is no government-imposed first-come, first-served rule. Nor does this case implicate the rights cable companies have in their private distribution systems, the question that divided the Court in *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996). And it does not address Internet service or content providers; because only a government can create a public forum, this case does not concern places that *private* actors hold open to the public. The *amici* principally concerned with those issues take no position on the outcome here.

Nor is this case about whether New York acted wisely in designating its public access channels as public forums. Congress provided state and local governments autonomy in structuring public access television. If the New York model succeeds, other localities may follow suit. If it fails, New York can change course. What matters is that local governments are free to decide for themselves whether to configure public access television as a public forum. Petitioners' approach, by contrast, would deny local governments this choice.

STATEMENT

A. Legal background.

1. The First Amendment broadly protects speech in public forums. Traditional public forums are those "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks." *United States* v. *Grace*, 461 U.S. 171, 177 (1983).

A government may also "designate" a public forum by "intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). A designated forum may be either "of a limited or unlimited character." *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992). So long as the government chooses to keep a designated forum open, it "is bound by the same standards as apply in a traditional public forum." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983).

2. The First Amendment binds state actors. Sometimes, "an ostensibly private organization or individual" takes an action that "may be fairly treated as that of the State itself." *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Since the "Fourteenth Amendment is not [then] to be displaced," the Constitution applies to private action "fairly attributable" to the government. *Ibid.* Critical here is the "public function" analysis (*id.* at 296): "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become * * * subject to its constitutional limitations." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966).

B. Public access television.

Cable television systems "rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers." *Turner Broad. Sys. Inc.* v. *FCC* (*Turner I*), 512 U.S. 622, 627-628 (1994). Cable systems "make this connection much like telephone companies, using cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers." *Id.* at 628.

The building and maintenance of a cable system relies substantially on the use of public property—and the cooperation of local government. That is, "[t]he construction of this physical infrastructure entails the use of public rights-of-way and easements and often results in the disruption of traffic on streets and other public property." *Turner I*, 512 U.S. at 628. A cable system "depend[s] for its very existence upon express permission from local governing authorities." *Ibid.*

Early in cable's history, local governments entered franchise agreements with cable operators. *Denver Area*, 518 U.S. at 788 (Kennedy, J.). From these earliest agreements in the late 1960s and early 1970s arose "local initiatives" that resulted in public, educational, and government access television. *Ibid.*

Beginning with the Cable Communications Policy Act of 1984, Congress regulated certain aspects of cable franchises. Congress provided that "cable operator[s] may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1). These agreements serve to "authorize the construction of a cable system over public rights-of-way" and "through easements." *Id.* § 541(a)(2).

While establishing some federal policies governing cable systems, Congress retained local autonomy with respect to public access, educational, and government television—often called PEG channels. In 1984, recognizing that "almost all recent franchise agreements" provided for public access, Congress "continued the policy of allowing cities to specify in the cable franchises" requirements for public access. H.R. Rep. No. 98-934 (1984), 1984 U.S.C.C.A.N. 4667. Congress noted that public access channels are an "electronic marketplace of ideas"—"the video equivalent of the speaker's soap box," "available to all, poor and wealthy alike." *Id.* at 30, 36.

Congress provided that local governments, in exchange for access to public rights-of-way, "may require * * * that channel capacity be designated for public, educational, or governmental use" when they extend cable franchises. 47 U.S.C. § 531(b). In *Denver Area*, the plurality explained that "the requirement to reserve capacity for public access channels is similar to the reservation of a public easement, or a dedication of land for streets and parks, as part of a municipality's approval of a subdivision of land." 518 U.S. at 760-761.

Local governments may structure public access television in a variety of ways. While many channels are administered by "a nonprofit organization," others are run by the municipality or the cable company itself. *Denver Area*, 518 U.S. at 761 (plurality).

C. Public access in New York.

1. The State of New York has created a unique legal framework for public access television. New York, unlike most other states, requires its public ac-

cess channels to operate on a first-come, first-served basis.

State law obligates local governments to establish a public access channel when issuing cable franchises to operators with more than 36 channels. N.Y. Comp. Codes R. & Regs. (N.Y.C.C.R.R.) tit. 16, §§ 895.1(f), 895.4(b)(1). The public access channels must operate "without charge to the user." *Id.* § 895.4(c)(6).

State law specifically requires that "[c]hannel time shall be scheduled on the public access channel by the entity responsible for the administration thereof" on "a first-come, first-served, nondiscriminatory basis." 16 N.Y.C.C.R.R. § 895.4(c)(4). The cable franchisee "shall not exercise any editorial control"—unless the material is "obscenity or other content unprotected by the First Amendment." *Id.* § 895.4 (c)(8). Likewise, a "municipality shall not exercise any editorial control over any use by the public of a public access channel except as may be permitted by law." *Id.* § 895.4(c)(9).

To enable transparency, the "entity responsible for the administration of a public access channel" must record "the names and addresses of all persons using or requesting the use of any such channel," and it must make this information "available for public inspection for a minimum of two years." 16 N.Y.C.C.R.R. § 895.4(c)(10).

2. New York City established public access channels in Manhattan pursuant to this framework.

Manhattan public access television predates MNN. The first stations were established in the early 1970s. See Lisa Belkin, *Public Access TV: Behind*

the Scenes, N.Y. Times (Apr. 13, 1987). Later, New York City transferred administration of the Manhattan-area public access channels to MNN. JA22-23.[1]

The "2008 Cable Franchise Agreement by and between The City of New York and Time Warner Entertainment Company, L.P." (Franchise Agreement) provides for a minimum of six channels for public access. Franchise Agreement §§ 8.1.1, 8.1.3.[2] Time Warner agreed to carry these channels to every customer. *Id.* § 8.1.6(a).

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[1] On April 12, 1991, acting in his official capacity, Deputy Manhattan Borough President Derek Johnson incorporated MNN. See Certificate of Incorporation of Manhattan Community Access Corporation. In a press release, the City announced that "Manhattan Borough President Ruth Messinger appointed a seven-member initial board of directors." ***Messinger Announces Formation of Community Access Organization to Administer Public Access Cable Channels*** (May 16, 1991). Since then, at least two of MNN's board members are selected by the Borough President (Pet. App. 37a), who is herself a non-voting, *ex officio* member. See *MNN Staff*, MNN, perma.cc/A2VX-7QUF.

[2] New York City has posted the Franchise Agreement and the Community Access Organization (CAO) Agreement online. See perma.cc/UTP3-JW2Q (Franchise Agreement); perma.cc/63EZ-VYHY (CAO Agreement). For the Court's convenience, relevant passages are excerpted in the attached appendix.

The amended complaint cited to and quoted from both documents. See, *e.g.*, JA22-23. The courts below identified them in resolving this case. See, *e.g.*, Pet. App. 4a-5a, 37a. Petitioners cite to them, too. See, *e.g.*, Pet'rs Br. 7. They are therefore properly considered here. See *ATSI Commc'ns, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (courts deciding a motion to dismiss may consider "documents incorporated into the complaint by reference").

In the Franchise Agreement, the City and Time Warner agreed that the Manhattan Borough President (a New York City official) would "designate[]" a "nonprofit corporation" as the "Community Access Organization" (CAO) to administer the public access channels. Franchise Agreement § 1.18. See also *id.* § 8.1.8. The agreement between the CAO and Time Warner was part of the Franchise Agreement itself; it was "attached as Appendix C to this [Franchise] Agreement." *Id.* § 8.1.8. Moreover, the City and Time Warner agreed that the CAO must abide by "the rules and regulations of the NY [Public Service Commission], and applicable law." *Ibid.*

Through the Franchise Agreement, the City obligated Time Warner to make multi-million-dollar annual payments to the CAO. See Franchise Agreement §§ 8.2, 8.3. In this way, the City funds the CAO through mandatory payments imposed on cable operators.

The City has designated petitioner MNN as the "Community Access Organization" for Manhattan. MNN accordingly entered into the "CAO Agreement," as attached to the Franchise Agreement. See Pet. App. 37a; JA23 (identifying and quoting from CAO Agreement); App., *infra*, 24a-35a (relevant provisions of CAO Agreement).

The CAO Agreement identifies that MNN "has been designated by the Borough President as the CAO to receive such grants." CAO Agreement, at 2. It recounts that "the Franchise Agreement requires Time Warner Cable to make available * * * public access channels" and to provide "support payments and Cash Grants." *Ibid.* The CAO Agreement runs through the duration of the "Franchise Agreement,"

"*provided that* the designation of the CAO by the Borough President *remains in effect*." *Id.* § 5.1.02 (emphasis added). The CAO Agreement therefore recognizes the Manhattan Borough President's discretion to change designation of the CAO.

This agreement, moreover, details the multi-million-dollar annual payments that the City obligates Time Warner to make to MNN. First, Time Warner must pay MNN each month a per-subscriber amount: The fee began at $0.90 per subscriber, and it escalated to $1.30. CAO Agreement § 2.1.02. Additionally, the agreement requires Time Warner to make a series of cash grants to MNN, totaling $4.5 million. *Id.* § 2.2.

The CAO Agreement incorporates "all applicable local, state, and federal laws with respect to program content on the Public Access Channels" (CAO Agreement § 4.1), which includes New York's "first-come, first-served" law (16 N.Y.C.C.R.R. § 895.4 (c)(4)). Indeed, the CAO Agreement specifically obligates MNN to "maintain reasonable rules and regulations to provide for open access to Public Access Channel time, facilities, equipment, supplies, and training on a non-discriminatory basis and to the extent required by applicable law." CAO Agreement § 3.3.01. See also Pet. App. 37a.

Reflective of the governing legal structure, MNN has long stated that its "mission" is to "ensure the ability of Manhattan residents to exercise their First Amendment rights * * * on an open and equitable basis." Pet. App. 37a.

D. Factual background.

1. Respondents DeeDee Halleck and Jesus Papoleto Melendez were longtime public access producers in Manhattan. JA24.

Halleck is Professor Emerita of Communication at the University of California at San Diego; she is the author or editor of several books about public access television, including *Hand-Held Visions: The Uses of Community Media* and *Public Broadcasting and the Public Interest*. Halleck's 1965 film *Mural on Our Street* was nominated for an Academy Award for Best Documentary Short. Halleck formed Paper Tiger Television in 1981 to produce public access content. In 1989, she received a Guggenheim Fellowship for her work in public access. Halleck advocated for the creation of MNN in the early 1990s, and, through Paper Tiger TV, she had produced content for the channel since its creation. JA24; JA38.

Melendez is a poet and playwright. He is the author of several volumes of poetry, including *Casting Long Shadows, Street Poetry & Other Poems* and *Concertos on Market Street*. His work has been featured in *The Norton Anthology of Latino Literature*. *The New York Times* identified him as one of the "founders of the Nuyorican Poetry movement," calling him a "[p]oet and [p]rophet of El Barrio." David Gonzalez, *Poet and Prophet of El Barrio May Soon Be a Pauper*, N.Y. Times (Feb. 8, 2013).

Melendez was a regular contributor of content to MNN since the mid-1990s. JA24. He "assist[ed] youth and senior citizens at the University Settlement in East Harlem in producing" programming. *Ibid.* An MNN executive, Iris Morales, had invited Melendez to join its Community Leadership Program

to train him for the creation of content for MNN. JA25.

2. The events underlying this case followed MNN's refusal to air speech concerning its cancellation of community media grants.

Using funds received from cable operators, MNN had long issued grants to promote community media. Between 1992 and 2004, MNN awarded approximately three million dollars in grants to more than 70 diverse organizations. Rick Jungers, *MNN's Community Media Grants*, J. of Alliance for Community Media (2004), perma.cc/VR5P-CJPU. Rick Jungers, then the director of community media for MNN, explained that, "[t]hrough the Community Media Grant, [MNN] works and partners with Manhattan nonprofit and grassroots organizations to use media to facilitate community dialog, foster local artistic and cultural expressions, provide local perspectives in areas of the public interest, facilitate a more media literate community, and develop a community media infrastructure." *Ibid.*

Yet, in the fall of 2008, contemporaneous with MNN executives' taking massive pay raises, MNN summarily terminated the community media grant program, citing "financial difficulties." See *The Grant Program*, Take Back MNN Campaign, perma.cc/KB8F-PQDV. See also *MNN's 4 Top Executives Earn over 600k a Year*, Take Back MNN Campaign (Jan. 6, 2015), perma.cc/3WUS-ET9W. In 2004, MNN's executive director earned $107,124 in compensation and benefits. 2004 Form 990, perma.cc/ND52-QXUB. The next five highest-paid employees at the time had compensation and benefits totaling $302,409 (an average of $60,481 each). *Ibid.* By

2009—when MNN terminated the grants—the executive director's total compensation had almost doubled, to $195,534. 2009 Form 990, perma.cc/FYT9-ZG2C. The next two highest-paid employees received total compensation of $276,402 (an average of $138,201). In 2012, the executive director's total compensation had ballooned to $255,148. 2012 Form 990, perma.cc/2H4C-YA23.[3]

Respondents and other producers objected to MNN's decision to increase compensation so sharply for nonprofit executives while simultaneously ending the community media grants. As one blog post put it after recapping the relevant salary information, "Wonder where the new cameras and community media grant program went? * * * Now you know." *MNN's Tax Forms*, Take Back MNN Campaign (May 24, 2011), perma.cc/6EQF-EZJ3. Another post decried the increase to executive compensation in 2009, "the same year MNN killed the community media grant program." *Is This What Community Media Looks Like?*, Take Back MNN Campaign (May 24, 2011), perma.cc/TJ9L-2Y6W.

3. In December 2011, respondent Halleck, along with other public access producers, attempted to attend an MNN board meeting "to urge the MNN Board to reinstate" the "community media grant program." JA25. MNN's executive director, petitioner Coughlin, informed Halleck that, notwithstanding

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[3] The nonprofit executive director's compensation has continued to skyrocket. Three years later, in 2015, his total compensation reached $406,999. 2015 Form 990, perma.cc/U27M-V7F6. Over an 11-year span, total compensation MNN paid its executive director grew nearly fourfold. MNN has not, however, reinstated its community media grant program.

MNN's bylaws that require public meetings, the board meeting was closed to the public. *Ibid.*

On February 28, 2012, Halleck emailed petitioner Coughlin, requesting permission for her and respondent Melendez to speak at the March 2012 board meeting. JA26. Coughlin agreed. *Ibid.* On March 14, 2012, Halleck brought a video camera to the meeting. *Ibid.* Once Halleck began taping, Coughlin "abruptly ended the meeting and adjourned." JA27.

That same night, Melendez was at the MNN facility to participate in the Community Leadership Program. JA25-26. After having briefly attended the board meeting to lodge his protest, he returned to the Leadership Program. JA26-27. MNN employee Morales then called Melendez out of the Leadership meeting and labeled him a "traitor" for having joined with Halleck in protesting MNN's termination of the community media grants. JA27; Pet. App. 38a. MNN subsequently dismissed Melendez from the Leadership Program. Pet. App. 38a. He surmised "that the real reason for withdrawing the invitation was because Melendez had attended the MNN board meeting, which Halleck videotaped." *Ibid.*

In July 2012, MNN held an event to celebrate the opening of the new El Barrio Firehouse Community Media Center. Pet. App. 38a. Because MNN did not allow Halleck or Melendez inside, they stood outside on the sidewalk, interviewing attendees as they entered. *Id.* at 38a-39a.

With that footage, respondents produced a 25-minute video that criticized MNN for its conduct. At one point, the screen displays the message that, "[b]ecause [Melendez] showed an interest in attend-

ing the MNN board meeting, he was removed from the class and harshly reprimanded." *The 1% Visits El Barrio; Whose Community* (2:50). In the video, Melendez explains that MNN took adverse action against him because he had "issues against the board of directors" (*id.* at 17:36-17:57)—the "issues" were respondents' complaints regarding the community media grants.

During the filming, Joseph Figueroa, Morales' boyfriend, arrived. Pet. App. 39a. "When Halleck asked him to comment about public access, Figueroa responded, 'Don't f--- with me.'" *Ibid.* "When Melendez responded, 'Hey f--- you,' Figueroa rushed at him." *Ibid.* Security had to hold Figueroa back from striking Melendez; MNN nonetheless allowed Figueroa to attend the event. JA30.[4]

Following this incident, Melendez made a comment regarding race and class, noting that the security guard precluding him from entering was a minority. MNN subsequently argued that this comment amounts to an aggravated threat:

> You know what's funny? I got to wait for my people to stop working in this building so that I can gain access to it. Do you understand what I'm saying? Our people, our people, people of color, are in control of this building and I have to wait until they are fired, or they retire, or someone kills them so that I can come and have access to the facili-

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[4] Petitioners do not explain how their treatment of Figueroa—who was videotaped assaulting Melendez but received no suspension (JA30-32)—comports with "MNN's zero tolerance policy on harassment." Pet'rs Br. 10.

> ty here. Because I am being locked out by people of color. There's irony for you.

Pet. App. 39a.

Halleck and Melendez submitted this video to air on MNN. Pet. App. 5a-6a. MNN ran it once in October 2012, but shortly thereafter banned it from the network. *Id.* at 6a. MNN maintains that Melendez's comment that he could not access the building until the guards at the door are "fired, or they retire, or someone kills them" constituted an aggravated threat to MNN staff. *Ibid.*[5]

Petitioners suspended Halleck from submitting content to MNN for one year. Pet. App. 7a.[6] While Halleck's suspension has expired, she is still not permitted to air *The 1% Visits El Barrio* or any other program featuring Melendez. *Id.* at 40a.

MNN suspended Melendez for life. Pet. App. 7a. MNN maintains that it will never again allow Melendez to submit content to the public access channel in his community. *Ibid.*

E. Proceedings below.

Respondents filed suit, seeking injunctive relief.[7] They request an order restoring their right to place

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[5] During the motion hearing, the district court expressed skepticism that Melendez committed harassment: "I've looked at the video. * * * What's so threatening about it?" JA61.

[6] Petitioners contend that, at a chance meeting in July 2013, Melendez "threatened and pushed" Coughlin. Pet. App. 40a. Respondents allege that Coughlin fabricated the alleged physical aggression. JA34.

[7] Although the complaint included a generic claim for damages, respondents subsequently and categorically relinquished

content on Manhattan's public access channels. Respondents allege that petitioners—MNN and three of its employees—engaged in viewpoint discrimination by banishing them. Pet. App. 2a-3a. Respondents assert that MNN's stated reason for issuing their bans is pretext. JA32.

1. The district court dismissed the action. Pet. App. 34a-53a. It agreed "that the regulation of free speech in a public forum is 'a traditional and exclusive public function.'" *Id.* at 45a. The district court therefore concluded that the case turns on whether MNN administers a designated public forum. *Id.* at 46a.

The district court viewed public access channels broadly. Pet. App. 46a-50a. In addressing the legal status of the forum, the district court did not focus on the New York state law requiring first-come, first-served access. Instead, considering public access channels generally, the court observed that whether *all* "public access channels are public fora" "is certainly a close call." *Id.* at 51a. Ultimately, the court concluded that respondents "cannot establish that MNN was operating a public forum." *Id.* at 53a.

2. The court of appeals reversed, holding that "the public access TV channels *in Manhattan* are public forums." Pet. App. 3a (emphasis added). The court focused expressly on the New York law obligating "first-come, first-served nondiscriminatory" access to the channels. *Id.* at 4a. The court concluded that the specific overlay of federal, state, and munic-

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that request: "Plaintiffs withdraw their claim for monetary damages." D. Ct. Dkt. No. 43, at 25.

ipal law rendered Manhattan's public access channels a public forum. *Id.* at 13a-14a.

Because MNN was designated by the City of New York to administer the public forum, its conduct in doing so qualifies as state action. Pet. App. 14a-15a. In particular, the court explained that "[t]he employees of MNN are not interlopers in a public forum; they are exercising precisely the authority to administer such a forum conferred on them by a senior municipal official." *Id.* at 15a.

Concurring, Judge Lohier explained that "New York City delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels." Pet. App. 21a. He observed that "MNN's public access channels largely offer 'the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet.'" *Id.* at 20a.

Judge Jacobs dissented in part. Pet. App. 22a-33a. Approaching public access as a whole, he reasoned that a cable channel is not a "power[] traditionally exclusively reserved to the State," nor is it a "function[] of sovereignty." *Id.* at 25a. He did not address New York's first-come, first-served requirement.

SUMMARY OF ARGUMENT

New York (unlike most other states) has chosen to designate its public access channels as public forums. Administering a public forum is a traditional and exclusive public function. Respondents have

thus adequately pleaded that petitioners' challenged conduct was state action.[8]

I.A. People enjoy substantial free speech rights in public forums, including places so designated by state and local governments.

A public forum cannot be created by a private party or by government inaction. Rather, to designate a public forum, the *government* must *intentionally open* the forum for use by the public to speak. The administrator of such a forum generally lacks editorial discretion; if the speaker comports with the rules established for the forum, he or she has a right to speak.

By contrast, where the government creates a structure of *selective* access, there is no public forum. In that kind of place, the administrator retains editorial discretion to choose who will be permitted to speak.

B. The State of New York has chosen to designate its public access channels as public forums. State law requires those channels to operate on a first-come, first-served basis. They are free of charge and free of editorial control. New York has thus made its public access channels generally open to the public.

New York law is unique. Most other states have made different choices; they do not impose a first-come, first-served rule on public access channels. In those jurisdictions, public access administrators may

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[8] Because this case arises on a Rule 12(b)(6) motion to dismiss, respondents' factual allegations are assumed true. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2005 (2017).

exercise editorial control. These "selective access" regimes are not public forums.

C. Manhattan's public access channels are owned by the City, not MNN.

Petitioners assert, without explanation, that they own the relevant forum. They therefore contend that our argument requires accepting the premise that a public forum may be established on private property.

Petitioners are mistaken. The City—*not MNN*—owns the relevant rights. The City's contracts with the cable operators created the public access channels in Manhattan. Those contracts entitle the City to select the channels' administrator. The City chose petitioner MNN. But the City has express authority to remove MNN and replace it with another organization. MNN's tenure as administrator of Manhattan's public access channels is thus at the pleasure of the City. Because the City ultimately controls the public access channels, it was proper for the government to designate them as public forums.

The issues here are different from those in *Denver Area*. In that case, there was a conflict between the cable operator's rights to its private cable distribution network and the programmers' rights to place content onto that network. Because of that conflict, the opinions considered whether the *cable distribution system* was a public forum.

Here, there is no claim by or against a cable operator. As all agree—including the principal association that advocates on behalf of cable operators—the rights of cable operators are not at issue. The question is whether the *public access channels* are public forums. In New York, they are.

D. Congress has allowed state and local governments to make various choices about how to configure public access channels. New York has chosen to create venues for the exercise of First Amendment rights—a decision that enhances its citizens' freedoms. Petitioners, by contrast, seek a one-size-fits-all rule that would shackle local authority.

The question posed in this case is not whether New York's choice to structure public access television as a public forum is good policy. That is a decision for New York to make. Indeed, if New York ever dislikes the consequences of its decision, it can change course.

In any event, the First Amendment allows substantial leeway in the design of neutral time, place, and manner restrictions. For instance, although the Court has long held that school facilities opened to the public qualify as public forums, there has been no judicial micromanagement of schoolhouse meeting times. Instead, courts simply (and properly) enforce the rule that schools may not discriminate against disfavored groups and messages. The same is also true for public access channels that the government designates as public forums.

E. As several *amici* underscore, the issue posed here is narrow. This case does not address public access television in states that have made different choices. It does not implicate the rights of cable operators. And it says nothing about the Internet.

If a government did attempt to designate a public forum on private property, that would raise complex questions regarding the Takings Clause and compelled speech. But, because Manhattan's public access channels are owned and controlled by the City,

those issues are not present here. Indeed, petitioners have never raised them.

II.A. "Public functions" are a limited category of activities that states have traditionally and exclusively performed. They reflect an exercise of sovereignty. When a state delegates a public function to a nominally private entity, the Constitution continues to apply.

B. The administration of a public forum qualifies as a public function. The Court adopted this rule in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), and that holding remains correct. Public forums are created by government action. Once they are created, only the government has the authority to administer them. Absent a delegation of authority by the state, a private entity lacks authority to serve as gatekeeper to a public forum.

C. This conclusion precludes circumvention of the First Amendment. If a city delegates administration of a public park to a nonprofit, the First Amendment still governs the approval of demonstration permits. Likewise, a school district cannot evade *Good News Club* by designating a private entity to administer school facilities.

ARGUMENT

I. New York has chosen to designate its public access channels as public forums.

New York—unlike most other states—has designated its public access channels as public forums. It has done so by adopting a first-come, first-served rule that precludes the channels from exercising editorial discretion.

New York's designation of its public access channels as public forums accords with the underlying property rights. Municipalities create the public access channels in that state, and they determine who administers them. Relevant here, while New York City has chosen MNN to administer Manhattan's public access channels, the City retains sole discretion to remove MNN. MNN is wrong to assert that it possesses some ownership interest in the channels.

To be clear, only intentional *government* action can create a public forum. Public forums are not established by private parties or through government inaction. And constitutional safeguards would apply if a government sought to impose a public forum on private property. That is why several *amici* concerned with the potential application of the First Amendment to private businesses are neutral as to the outcome of this narrow dispute. See, *e.g.*, Internet Ass'n Br. 15-21 (arguing against application of the First Amendment to private Internet companies); EFF Br. 10-18 (describing First Amendment interests of private entities); NCTA Br. 4-17 (advocating for cable operators' First Amendment rights); Chamber Br. 6-18 (arguing that privately-owned forums are not subject to the First Amendment). As these briefs confirm, respondents' position is fully compatible with protecting businesses' private property rights.

A. State and local governments possess discretion to designate public forums.

Public forums are "places which by long tradition *or by government fiat* have been devoted to assembly and debate"; in these places, "the rights of the state

to limit expressive activity are sharply circumscribed." *Perry*, 460 U.S. at 45 (emphasis added).

1. Traditional public forums are places like "streets and parks" that "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry*, 460 U.S. at 45 (quoting *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J.)).

In a traditional public forum, "[r]easonable time, place, and manner restrictions are allowed," but "any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469 (2009). And "restrictions based on viewpoint are prohibited." *Ibid.*

2. "In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public." *Cornelius*, 473 U.S. at 802. A designated forum may be either "of a limited or unlimited character." *Krishna Consciousness*, 505 U.S. at 678. The designated forum is an unlimited one if it is designated "for use by the public at large for assembly and speech," and it is a limited forum if it is designated "for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802.

School facilities purposefully opened to the public often qualify as public forums. See *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). So do public university

programs open to at least some range of speakers. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Widmar* v. *Vincent*, 454 U.S. 263 (1981). The municipal theater in *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975), was likewise a public forum.

If the forum is unlimited, its regulation "is subject to the same limitations as that governing a traditional public forum." *Krishna Consciousness*, 505 U.S. at 678. While "a state is not required to indefinitely retain the open character of" a designated public forum, the forum "is bound by the same standards as apply in a traditional public forum" so long as it remains open. *Perry*, 460 U.S. at 46.

Alternatively, a government may designate a "limited" public forum by opening a forum "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Summum*, 555 U.S. at 470. In these places, "the constitutional right of access" "extend[s] only to other entities of similar character" to those allowed to access the forum. *Perry*, 460 U.S. at 48. In such a limited public forum, "[a]ny access barrier must be reasonable and viewpoint neutral." *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 679 (2010).

"The government does not create a public forum by inaction." *Cornelius*, 473 U.S. at 802. "Designated public fora * * * are created by *purposeful* governmental action." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 677 (1998) (emphasis added).

3. In assessing whether a government has designated a place as a public forum, the Court considers the forum's structure and nature.

Structure. For a forum to qualify as a "designated public forum, whether of a limited or unlimited character," a government must have "opened [the forum] for expressive activity by part or all of the public." *Krishna Consciousness*, 505 U.S. at 678. That is, the forum must be "generally open" to at least some class of speakers. *Widmar*, 454 U.S. at 267. This is often referred to as a structure of "general access." *Cornelius*, 473 U.S. at 803.

In a public forum, the administrator cannot impose editorial control beyond the structure of the forum itself. Because an unlimited public forum lacks any structural, state-imposed limitations, the administrator cannot exercise any editorial control. See *Summum*, 555 U.S. at 469-470. In a limited public forum, the administrator may restrict the range of speakers or the range of topics to those within the scope of the limited forum, but the administrator cannot exercise additional control. *Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum, * * * the State must respect the lawful boundaries it has itself set.").

By contrast, a "selective access" regime is not a public forum. *Perry*, 460 U.S. at 47. "A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Arkansas Educ. Television*, 523 U.S. at 679. Instead, where a speaker must first "obtain permission," the government has editorial control. *Cornelius*, 473 U.S. at 804. A license plate is not a public forum, for example, because "the State exercises final authority over each specialty license plate design." *Walker* v. *Texas*

Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2251 (2015).

Nature. The Court also considers "the nature of the property and its compatibility with expressive activity" to help "discern the government's intent." *Cornelius*, 473 U.S. at 802. A public forum is typically a place that has as "a principal purpose * * * the free exchange of ideas." *Id.* at 800.

The Court has repeatedly confirmed that a public forum need not be physical space. It may be "a place *or channel of communication.*" *Cornelius*, 473 U.S. at 802 (emphasis added). A public forum includes communication channels that are more "metaphysical than in a spatial or geographic sense." *Rosenberger*, 515 U.S. at 830. The "same principles" of public forum analysis are thus "applicable" to a student activity fund (*ibid.*), a school mail system (*Perry*, 460 U.S. at 46-47), the Combined Federal Campaign (*Cornelius*, 473 U.S. at 801), and advertising space on city buses (*Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 300 (1974)).

B. New York—unlike most other states—has designated its public access channels as public forums.

1. New York has chosen to designate its public access channels as public forums.

Structure. New York law structures its public access television channels as "generally open" to the public.

State law mandates that New York's public access channels operate on a "first-come, first-served" basis, so administrators are not granted editorial control. 16 N.Y.C.C.R.R. § 895.4(c)(4). Moreover,

"[c]hannel time for PEG access programming shall be without charge to the user." *Id.* § 895.4(c)(6). To make the public aware of this forum, petitioners must periodically transmit messages "to the general public of the opportunity to use such channel." *Id.* § 895.4(c)(3).

A "municipality shall not exercise any editorial control over any use by the public of a public access channel except as may be permitted by law." 16 N.Y.C.C.R.R. § 895.4(c)(9). Nor can anyone else exercise "any editorial control"—unless the "content" is "unprotected by the First Amendment." *Id.* § 895.4(c)(8).

In the district court, petitioners admitted that New York's "nondiscriminatory regulation" precludes it from engaging in any "viewpoint-based discrimination." JA60. MNN acknowledges that state law precludes it from banning content because it "criticized MNN." JA59. This is the hallmark of a public forum: New York law opens the state's public access television platform to the public, and, as MNN concedes, state law *forbids* it from exercising additional editorial control.[9]

New York has thus purposefully "opened" its public access channels "for expressive activity by part or all of the public." *Krishna Consciousness*, 505 U.S. at 678. MNN is "generally available" to the public. *Widmar*, 454 U.S. at 264. MNN's own mission statement recognizes that MNN exists to "ensure the

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[9] State law bars MNN from editorial discretion, a conclusion that MNN accepts. JA59-60. MNN is therefore unlike traditional news stations, where "editorial staff[s]" exercise "discretion." *Arkansas Educ. Television*, 523 U.S. at 673.

ability of Manhattan residents to exercise their First Amendment rights * * * on an open and equitable basis." Pet. App. 37a.

In fact, MNN has previously taken the position that it is "a First Amendment forum." See *Denver Area* JA238 (Nos. 95-124 & 95-227). In comments to the FCC, MNN urged "the Commission not to jeopardize the integrity of public access as a First Amendment forum." *Ibid.* See also *id.* at JA235 (identifying MNN's mission as tethered to Manhattan residents' First Amendment rights).

This is analogous to school districts or public universities that have opened their "facilities for use * * * by community groups for a wide variety of social, civic, and recreational purposes." *Rosenberger*, 515 U.S. at 830. See also *Widmar*, 454 U.S. at 267 ("[T]he University has created a forum generally open for use by student groups."). Just as those facilities qualify as public forums once opened to the public, so too does New York's public access television.

Nature. The nature of public access television is entirely consistent with New York's choice to designate it as a public forum.

In *Widmar*, this Court concluded "that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum," partly because "[t]he college classroom" and its "surrounding environs" are "peculiarly 'the marketplace of ideas.'" 454 U.S. at 267 n.5.

Public access channels like New York's are likewise "marketplaces of ideas." Congress itself has identified that public access channels are an "electronic marketplace of ideas"—"the video equivalent

of the speaker's soap box," "available to all, poor and wealthy alike." H.R. Rep. No. 98-934, at 30, 36 (1984). Indeed, MNN's "programming relates to political advocacy, cultural and community affairs, New York elections, religion—in a word, democracy." Pet. App. 20a (Lohier, J., concurring). Like the theater in *Southeastern Promotions*, a public access channel is "designed for and dedicated to expressive activities." 420 U.S. at 555.

What is more, the Court has previously observed that "[t]here can be no disagreement" on the conclusion that "[c]able programmers * * * engage in and transmit speech." *Turner I*, 512 U.S. at 636. Producers of public access programming, including respondents, likewise "engage in and transmit speech" when they use the forum of public access television.

One final point: We have repeatedly stated that New York's free, first-come, first-served policy is what renders public access channels in that state public forums. See, *e.g.*, Opp. 1-2, 8, 14-19, 24. We explained that petitioners' inability to "assert editorial control over the content aired" is "the calling card of a public forum." *Id.* at 24. Petitioners do not engage our argument; indeed, petitioners disregard New York's first-come, first-served law entirely. Petitioners insist on viewing the relevant question as whether *all* public access channels are a public forum. See Pet'rs Br. 24-37.[10] That is simply not our argument.

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[10] While doing so, petitioners repeatedly suggest that *we* advance a "per se" rule (Pet'rs Br. 5, 20, 34, 35) or "categorical" approach (*id.* at 20, 36). That is incorrect. Our position is governed by the unique features of New York law.

2. New York's free, first-come, first-served, no-editorial-control approach to public access is unusual. To our knowledge, only Hawaii and Rhode Island have comparable first-come, first-served laws. See Haw. Admin. Code § 16-131-32; 815 R.I. Admin. Code § 10-05-1.14.1.

The vast majority of states have no similar requirement.[11] Highlighting that this is a matter of discretion for local governments—and a choice with consequences—Minnesota expressly authorizes municipalities to determine whether or not public access channels must be "available for use by the general public on a first-come, first-served, nondiscriminatory basis." Minn. Stat. Ann. § 238.084(1)(z).

Where state or local governments have not imposed a first-come, first-served law with respect to public access television, the administrator of the station may choose to exercise editorial discretion in selecting the content to air. There is no federal law that obligates public access channels to operate on a first-come, first-served basis.

It is little surprise, therefore, that public access channels outside New York *do* engage in editorial cu-

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[11] See, *e.g.*, Ariz. Rev. Stat. Ann. § 9-506(D)(1); Cal. Pub. Util. Code § 5870; Conn. Agencies Regs. § 16-331a-2; Fla. Stat. Ann. § 610.109; Idaho Code Ann. § 50-3010; Ind. Code Ann. § 8-1-34-25; Iowa Code Ann. § 477A.6; Kan. Stat. Ann. § 12-2023; La. Stat. Ann. § 45:1369; Me. Rev. St. Ann. tit. 30-A, § 3010; Mo. Ann. Stat. § 67.2703; Nev. Rev. Stat. § 711.810; N.H. Rev. Stat. Ann. § 53-C:3-a; N.J. Admin. Code § 14:18-15.4; N.C. Gen. Stat. Ann. § 66-357; Ohio Rev. Code Ann. § 1332.30; Okla. Stat. Ann. tit. 11, § 22-107.1; Tenn. Code Ann. § 7-59-309(a); Tex. Util. Code Ann. § 66.009; Va. Code Ann. § 15.2-2108.22; W. Va. Code Ann. § 24D-1-9.

ration. California, for example, lacks a statewide first-come, first-served law. See Cal. Pub. Util. Code § 5870. Consistent with state law, the Los Angeles Cable Television Access Corporation airs only "the 'Best Of' Public Access programming in the City of Los Angeles." *Public Access Guidelines*, L.A. Cable Television Access Corp., 1, perma.cc/JE7W-P87H. An "advisory committee" selects the content deemed "Best Of" on "a quarterly basis." *Ibid.* The content will run only if the committee makes this editorial decision. *Ibid.*[12]

That sort of structure is not "generally open" to the public. *Widmar*, 454 U.S. at 267. Rather, it is the sort of "selective access" regime where a would-be speaker must first ask for "permission." *Perry*, 460 U.S. at 47.

Congress let state and local governments make various choices regarding public access television. One of those choices is whether to render those channels public forums. Some states—New York, Rhode Island, and Hawaii—have done so by intentionally opening the channels to the public. Most other states have not. These different choices warrant respect.

3. Because it makes no difference here whether the public forum is considered limited or unlimited,

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[12] Petitioners point to West Hollywood Public Access. See Cert. Reply 5 n.6. That entity is operated by the City of West Hollywood, so it is necessarily a state actor. See *Public Access Television*, City of W. Hollywood, perma.cc/4ZWK-ULEH. In any event, what matters for the public forum analysis is whether a *government* has chosen to render a forum one that is open to the public. *Arkansas Educ. Television*, 523 U.S. at 677. When a local government makes this choice, it has consequences.

the Court need not address the issue. See *Good News Club*, 533 U.S. at 106 (reserving whether forum is limited or unlimited).

Assuming for the sake of argument that Manhattan public access channels are limited to "certain groups" (*Rosenberger*, 515 U.S. at 829), respondents are within the class of individuals for whom the forum is open. Respondents previously submitted content to MNN, and MNN invited Melendez to participate in a class to train him to provide video for airing. See JA24-26.

Respondents moreover allege that petitioners engaged in viewpoint discrimination: Petitioners disliked the viewpoint respondents displayed in *The 1% Visits El Barrio* and banished them from the public forum for that reason. See JA26-35. In a limited public forum, "viewpoint discrimination * * * is presumed impermissible when directed against speech otherwise within the forum's limitations." *Rosenberger*, 515 U.S. at 830.

If the Court does reach the issue, the first-come, first-served requirement creates an unlimited public forum. New York law provides "for use by the public at large for assembly and speech," regardless of the identity of the speaker or the nature of the subject. *Cornelius*, 473 U.S. at 802. But whether the designated public forum is deemed limited or unlimited, respondents' viewpoint discrimination claim remains equally viable.

C. New York's choice is consistent with the underlying property rights.

New York's decision to designate its public access channels as public forums is consistent with the un-

derlying property rights because New York owns and controls the relevant rights.

1. New York City owns and controls its public access channels.

a. Petitioners assert, without explanation, that this case involves "privately-owned and controlled fora." Pet'rs Br. 30-34 (capitalization omitted). That is flatly wrong. MNN serves as administrator of Manhattan's public access channels solely at the pleasure of New York City. The City retains complete discretion to remove MNN as administrator and replace it with another entity. It is the City—*not MNN*—that owns the relevant rights. Because of this public ownership, petitioners' arguments regarding the intersection of public forums and private property (*ibid.*) are not relevant to this case.

Cable systems involve three principal kinds of property rights, only the third of which is relevant here:

i. Cable distribution network rights. Cable operators own their cable distribution networks, which physically transmit cable signals to subscribers' homes and offices. See *Turner I*, 512 U.S. at 628-629. These networks are largely built on public rights-of-way and easements. *Ibid.* Cable operators have property and speech rights with respect to their distribution networks. Those rights were at stake in *Denver Area*, but they are not at issue here.

ii. Content rights. Individual content is typically owned by the producers who create it. There is no dispute regarding content rights in this case.

iii. Content placement rights. This case involves the right to place content on a particular channel.

That right is what gives a cable programmer access to and control over a cable channel.

Cable operators often reach agreements with cable programmers (like ESPN) that provide the programmer access to a particular channel of the cable system. *Turner I*, 512 U.S. at 629. After that relationship is created, the "cable system" becomes a "conduit," "transmitting" the content selected by the programmer "on a continuous and unedited basis to subscribers." *Ibid.*

As required by state law, New York City created public access channels when it entered into franchise agreements with Manhattan-area cable operators. The City's Franchise Agreement with Time Warner, for example, creates at least six public access channels. See, e.g., Franchise Agreement §§ 8.1.1, 8.1.3. The City continues to own and control these channels.[13]

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[13] For purposes of this case, it does not matter if a cable programmer is deemed to "own" a cable channel outright—or to have a long-term interest equivalent to a lease. In *Southeastern Promotions*, Chattanooga had a "long-term lease" to the "privately owned" Tivoli theater. 420 U.S. at 547. The lease gave Chattanooga a content placement right; that is, Chattanooga held the right to select what content would be displayed in the theater, even though it did not own the theater itself. See *ibid.* The Court nonetheless concluded that the theater was a public forum to which the First Amendment applied. *Id.* at 553-555. See *Cornelius*, 473 U.S. at 803. In *Denver Area*, Justice Thomas identified *Southeastern Promotions* as supporting the contention that "[o]ur public forum cases have involved property in which the government has held at least some formal easement or other property interest permitting the government to treat the property as its own in designating the property as a public forum." 518 U.S. at 828.

Although state law obligated the City to create the public access channels, it afforded the City discretion as to how to administer them. In particular, the City could choose between running the channels itself—or assigning that administrative function to a third party. See 16 N.Y.C.C.R.R. § 895.4(c)(1).[14]

In accord with this framework, several municipalities in New York have chosen to administer the public access channels themselves. Buffalo Public Access, for example, is "a division of the City of Buffalo Office of Telecommunications"; "[t]he Office is responsible for programming on Channel 20," Buffalo's public access station. See perma.cc/3ZN7-V8LB. Municipalities in Brighton (perma.cc/P4EV-YDR5), Irondequoit (perma.cc/USM7-C7DW), Rye (perma.cc/33H6-6227), Scarsdale (perma.cc/9LU3-W8V7), and White Plains (perma.cc/4WKL-38UU) have likewise decided to run their public access channels themselves.

As we have said, per state law, New York's public access channels must operate on a first-come, first-served basis. See pages 26-29, *supra*. Had New York City chosen to run its public access channels itself—

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[14] To resist the conclusion that the City owns the relevant right, petitioners cite 16 N.Y.C.C.R.R. § 895.4(c)(1) and argue that, "under the applicable regulations, control of the public access channels in Manhattan has never resided with the City." Pet'rs Br. 44-45. Not so. Section 895.4(c)(1) establishes that the cable operator is the default administrator of public access if the municipality fails to designate another "entity." This imposes an obligation on the cable operator, not a limitation on the municipality. The municipality retains complete control—it can designate *any* entity, including *itself*, to operate the public access channels. The several municipalities in New York that *do* administer their public access channels directly prove the point.

like several other municipalities in New York do—they would plainly qualify as public forums.

New York instead chose to delegate the administrative function to MNN. That delegation does not affect the public forum analysis because there was no transfer of ownership to MNN. The City—*not MNN*—continues to own the essential rights to the channels. This is proven by the fact that the City retains discretion to remove MNN as administrator and substitute a new entity to run the public access channels. In total, MNN is administering a publicly-owned right to public access channels.

In the City's Franchise Agreement with Time Warner, the City determined that it would choose a "Community Access Organization" to administer the public access channels. Franchise Agreement §§ 1.18, 8.1.8. The CAO is expressly defined as "the nonprofit corporation that has been designated by the Borough President." *Id.* § 1.18. The City—and the City alone—selects the administrator for the public access channels.

The first clause in the CAO Agreement between MNN and Time Warner recognizes that their relationship exists solely because MNN was "designated by the Borough President of Manhattan" as the CAO. CAO Agreement, at 2. Per the CAO Agreement, MNN's function is to "administer and manage" the placement of content on the public access channels. *Id.* § 3.1. Nothing suggests that MNN owns the right to place content on the channels; it has been assigned administration and management only.

Critically, in identifying the length of their agreement, MNN and Time Warner agreed that their relationship is contingent on "the designation of the

CAO by the Borough President remain[ing] in effect." CAO Agreement § 5.1.02. If that designation does not "remain in effect," then MNN's ability to deliver content via Time Warner's cable system ceases. *Ibid.* This agreement—which was created via negotiations between the City and Time Warner, and which was attached to the Franchise Agreement (see Franchise Agreement § 8.3)—confirms that the City has authority to remove MNN as the CAO. MNN is itself party to this agreement. The City is under no obligation whatever to maintain MNN as the CAO for Manhattan.

History illustrates the Manhattan Borough President's authority. According to MNN's own account, MNN "assumed administrative responsibility for the public access channels in September 1992 after twenty years of administration by the local cable operators." *Denver Area* JA235. See also Pet'rs Br. 3 ("[T]he Manhattan Bureau President chose MNN to replace Time Warner."). That is, the City changed administrators to MNN. MNN currently has what it identifies as "administrative responsibility" (not ownership) because of the City's decision. The City has the authority to make a similar change in the future.

In sum, the City controls Manhattan's public access channels. It created those channels through its agreements with the cable operators. And it selects who administers those channels. While it has chosen MNN for now, the City may change administrators, a power it has previously exercised. This all reflects

that the City—*not MNN*—owns and controls the rights essential to the public access channels.[15]

b. This conclusion is independent of the issue that engaged the Court in *Denver Area*—the extent and nature of the cable operators' property and First Amendment interests in their cable distribution networks.

Those issues were present in *Denver Area* because there was a *conflict* between the cable operators' rights to control their distribution network and the programmers' content placement rights. Justice Thomas, in his partial dissent, was of the view that, "*when there is a conflict*, a programmer's asserted right to transmit over an operator's cable system must give way to the operator's editorial discretion." 518 U.S. at 816 (emphasis added).

Here, there is no such conflict. There is no claim by or against a cable operator. This case does not therefore pit the cable programmer's rights against the cable distributor's rights.

Put differently, the issue in this case is whether a New York public access channel can censor content that producers seek to air. The issue in *Denver Area*, by contrast, was whether the *cable operator* could censor content. These are materially distinct inquiries because they involve different underlying rights.

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[15] If the City transferred the public access channels to another entity, the new administrator may not be able to use the name "Manhattan Neighborhood Network" or other intellectual property that MNN might claim to own. But the public forum is not the channels' name. It is the public access channels themselves—which the City controls.

The *amicus* briefs confirm this point. NCTA, which was a party in *Denver Area*, represents members who own and operate "cable television systems serving nearly 80 percent of the nation's cable television customers." NCTA Br. 1. NCTA advances Justice Thomas' position from *Denver Area*. *Id.* at 4-17. But NCTA expressly recognizes that "whether the PEG-channel requirement is itself constitutional is not directly before this Court." *Id.* at 3. For that reason, NCTA—the voice of the cable industry—does not oppose a ruling in respondents' favor. *Id.* at 2.

In fact, our position is consistent with the views expressed by both Justice Kennedy and Justice Thomas in *Denver Area*. Justice Kennedy (joined by Justice Ginsburg) recognized that when a public access channel is "open to all comers"—as New York's are—then the "[p]ublic access channels" are "a designated public forum." 518 U.S. at 791.

Justice Thomas' views in *Denver Area* also support our position. Justice Thomas noted that "[i]t is no doubt true that once programmers have been given, rightly or wrongly, the ability to speak on access channels, the First Amendment continues to protect programmers from certain Government intrusions." 518 U.S. at 820. In view of the franchise agreements, the public access channels certainly exist. If New York has structured these channels as a public forum, the First Amendment applies.

The *Denver Area* dissent's discussion of the public forum doctrine (518 U.S. at 826-831) is also consistent with our argument. Because *Denver Area* addressed a conflict between the cable network distribution right and the programmers' content placement right, Justice Thomas focused on whether the

cable network itself is a public forum. The dissent began with the premise that "[c]able systems are not public property," and it continued to reason that governments generally may not designate public forums on private property. *Id.* at 827-829.

But this case does not require the Court to decide whether the *cable distribution network* is itself a public forum. That is not our argument. The only issue is whether local governments can configure the *public access channel* as a public forum. Because that right is publicly held, the private property analysis of the *Denver Area* dissent is inapplicable.

Local governments have the autonomy to create a public access station that is a designated public forum—the television equivalent of a public park or sidewalk. It would be a surprising affront to localism if state and municipal governments *lacked* this power. Recognizing that this authority exists—and that New York has exercised that power here—is all that our argument requires.

2. Alternatively, there is a public easement.

If, contrary to our principal position, MNN owns some relevant right, that right is subject to an easement in favor of the public (on the first-come, first-served basis defined by state law). Likewise, if the cable operators' interests were at issue here, they would also be subject to easements.[16]

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[16] MNN—one of the Nation's largest administrators of public access television—cannot seriously dispute that there is, at the very least, a public easement that authorizes public access television. Otherwise, public access television itself would lack legal foundation.

a. In *Denver Area*, at least five Justices agreed that the legal requirements that give rise to public access channels create a form of a public easement. The three-Justice plurality explained that "the requirement to reserve capacity for public access channels is similar to the reservation of a public easement, or a dedication of land for streets and parks, as part of a municipality's approval of a subdivision of land." 518 U.S. at 760-761. And Justice Kennedy (joined by Justice Ginsburg) explained that a cable franchise agreement "create[s] a right of access equivalent to an easement in land." *Id.* at 794.

Justice Thomas' dissent also recognized that a public forum can exist on property in which a government has a legally-protected interest, such as an easement. The dissent noted "the common practice of formally dedicating land for streets and parks when subdividing real estate for developments." 518 U.S. at 827. "Such dedications may or may not transfer title, but they at least create enforceable public easements in the dedicated land." *Ibid.* As Justice Thomas concluded, "[t]o the extent that those easements create a property interest in the underlying land, it is that government-owned property interest that may be designated as a public forum." *Id.* at 828.[17]

There was thus common ground in *Denver Area* that, in appropriate circumstances, the government's

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[17] Lower courts have properly applied public forum analysis to sidewalks that are privately-owned but subject to a public easement. See *First Unitarian Church* v. *Salt Lake City Corp.*, 308 F.3d 1114, 1123 (10th Cir. 2002); *Venetian Casino Resort, L.L.C.* v. *Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 943 (9th Cir. 2001).

control over an easement can be a basis for a public forum.

b. If (contrary to fact) MNN owns the relevant rights relating to Manhattan's public access channels, MNN's ownership is subject to an easement for public access.

As we have said, whatever interest MNN holds flows from the City. The City designated MNN as the administrator of Manhattan's public access channels, and MNN is legally obligated to air content on a free, first-come, first-served basis. See pages 5-6, 9, 26, *supra*. MNN recognized as much below. See JA59-60. Any private right MNN arguably holds is therefore subject to a public easement. And the City may designate that easement as a public forum. See Restatement (Third) of Property § 2.1 (2000) (describing ability of a contract to impose a servitude).

c. If (contrary to fact) the rights of cable operators are at issue here, they are similarly subject to an easement.

In a franchise agreement, a cable operator receives a critical benefit not available to the public at large—permission to use public rights-of-way to erect a cable system. See 47 U.S.C. § 541(a). The government owns and manages these rights for the public welfare. Here, Time Warner expressly bargained for access to these rights. See, *e.g.*, Franchise Agreement §§ 1.47, 4.1.

In exchange for conferring this benefit on Time Warner, the City received a reciprocal easement—the right to place content over certain channels on the cable system. As we have described, the Franchise Agreement requires a minimum of six public

access channels (Franchise Agreement § 8.1), and it obligates Time Warner to transmit public access channels to all subscribers (*id.* § 8.1.6). The Franchise Agreement contains detailed provisions about various enforcement mechanisms, including an "injunction," if necessary. See, *e.g.*, *id.* § 15.1.6. The cable operator cannot transfer the cable franchise without the City's permission (*id.* § 13.1), and the CAO Agreement obligations expressly bind any successor (CAO Agreement § 5.2).

In sum, the Franchise Agreement conferred on the City a legally-enforceable right to place content on Time Warner's cable system in exchange for Time Warner's right to run cable through public rights-of-way. That obligation follows the cable system itself, continuing to apply even if Time Warner sells its cable system. The content placement right—and the public forum it represents—has existed since the creation of the cable company's property right in the cable system. These express contractual provisions thus create a servitude on the underlying property rights. See Restatement (Third) of Property § 2.1.

D. Congress vested local governments with discretion to experiment—and the wisdom of establishing public forums is properly a local decision.

Congress has conferred discretion on state and local governments to create public access television and, if they choose to exercise that discretion, how to structure it. See, *e.g.*, 47 U.S.C. § 531 ("A franchising authority *may* establish requirements" regarding PEG channels.) (emphasis added). The courts should respect New York's policy choices.

"This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). The Court affords "[d]eference to state lawmaking," which "allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." *Ibid.* Indeed, local governments are "in a better position than the Judiciary to gather and evaluate data on local problems." *City of L.A.* v. *Alameda Books, Inc.*, 535 U.S. 425, 440 (2002).

Often, as reflected here, "[f]ederalism secures the freedom of the individual." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). New York has chosen to designate for its residents a public forum in public access television. That freedom-enhancing decision is properly the right of a state or local government.

For these reasons, petitioners' concern regarding the policy consequences of New York's action are misplaced. See Pet'rs Br. 58-59. See also CAC Br. 22-28.[18] Petitioners should direct these views to New York government—not this Court. If, as petitioners maintain, existing state law is bad policy, New York can change it. The wisdom of New York's decision as a policy matter is not a question for this Court. The Court should not "disable local governments from

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[18] Chicago Access Corporation's concerns are additionally unfounded because there is no evidence that Illinois or Chicago has adopted a first-come, first-served policy.

making" "choice[s]" regarding how to structure public access. *Denver Area*, 518 U.S. at 773 (Stevens, J.).

In all events, petitioners' concerns regarding the practicalities of our position lack merit. To begin with, for decades, the First Amendment has governed the scores of public access channels across the nation that are run *directly* by municipalities. See, *e.g.*, page 35, *supra*. Several courts, moreover, have entertained First Amendment claims against public access stations. See Pet. App. 49a-50a & n.7. See also Pet'rs Br. 27-30. Yet petitioners muster no real-world examples of judicial overreach. Pet'rs Br. 58-59.

That is for good reason: Regardless whether New York's public access channels are limited or unlimited public forums, MNN may impose neutral time, place, and manner restrictions. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech."). While this requires "narrow tailoring," the administrator of a forum need not choose "the least restrictive or least intrusive means" of regulating it. *Id.* at 798-799. MNN certainly can schedule its programs—just as school districts can schedule outside groups' meetings in classrooms, even when those classrooms have been opened as a public forum. And, if MNN is a limited public forum, it may reasonably restrict the range of speakers and the permissible subjects of speech. See *Good News Club*, 533 U.S. at 106-107.

Subjecting MNN to the First Amendment precludes viewpoint discrimination in its administration of the public access channel. According to its own policies, MNN *already* disclaims viewpoint discrimina-

tion. Pet. App. 37a. And, in the district court, petitioners conceded that, pursuant to state law, MNN cannot "exercise viewpoint-based discrimination." JA60. Applying the First Amendment cannot pose any practical burden because, as MNN concedes, it is already subject to state law requiring viewpoint neutrality.

What is more, MNN is a state actor solely to the extent it performs a public function—here, administering a public forum. See pages 51-59, *infra*. We do not contend that any of MNN's *other* conduct is subject to constitutional standards.[19]

MNN's preference to avoid litigation—a preference no doubt shared by the school in *Good News Club* and the university in *Rosenberger*—is no reason to cast off constitutional obligations. The Court does not allow schools to discriminate against religious organizations merely because litigation itself can be an "expense" or "distraction" in the face of "scarce resources." Pet'rs Br. 59. The result should be no different here.

Finally, lower courts are well-equipped to weed out meritless claims. The claim in this case, however, does have merit. Respondents criticized MNN for terminating a grant program while simultaneously increasing executive compensation. MNN subsequently retaliated by banning respondents—and their speech—from the public access channels.

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[19] We do not contend that MNN is subject to "state sunshine" laws. Pet'rs Br. 59 n.14. That said, MNN is subject, expressly, to a public disclosure law. See page 6, *supra*.

E. This case does not address other public access structures, cable operators, the Internet, or private property.

The Court should decide this case on its narrow terms.

1. Petitioners are wrong to assert that the rule implicated here has any bearing on "Time Warner, Facebook, Twitter, and National Public Radio." Pet'rs Br. 57.

To begin with, this case involves public access in only the few states with a free, first-come, first-served rule. See pages 30-31, *supra*. We do not urge—and the Court should not adopt—a one-size-fits-all approach.[20]

Moreover, as *amicus* NCTA underscores, this case does not implicate rights relating to a cable distributor. See page 39, *supra*. The issue that divided the Court in *Denver Area* is not presented here.

Nor does this case involve privately-owned Internet sites. The Internet Association (at 23) confirms the "highly specific facts" present in this case—and the "correspondingly limited holding" that is warranted. While the Internet Association opposes imposing the First Amendment on private Internet sites, it is neutral as to this case. *Id.* at 24. This fatally undermines the speculative fears raised by peti-

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[20] Nor does this case address leased access television, where no government has designated the channel as a forum open to the public. Cf. Pet'rs Br. 26 n.4. *Loce* v. *Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256 (2d Cir. 1999), is therefore consistent with our argument; there was no state-imposed free, first-come, first-served rule there. Pet. App. 15.

tioners (at 56-57) that a holding for respondents would render Internet sites public forums.

Indeed, only a *government* may designate a public forum; a public forum cannot be created by a private party or via government inaction. See pages 22-24, *supra*. See also EFF Br. 19. The First Amendment does not govern spaces created by private parties—even if those privately-owned spaces have facial similarities to public forums. See Cato Br. 11-14; Chamber Br. 7-9. Facebook and YouTube, for example, are not "public forums" in the First Amendment sense.[21] This also explains why our rule has no bearing on National Public Radio or any other forum that has not been designated by the government as generally open to the public.

2. Petitioners and some *amici* focus on the extent to which a government may designate a public forum on private property. See Pet'rs Br. 30-34, 56-58. But that is not this case: As we have explained, New York City, not MNN, owns and controls the public access channels. See pages 32-43, *supra*. If a government did seek to designate a public forum on private property, two complex questions would emerge. Petitioners have not raised—because they cannot raise—either contention.

The first is the extent to which the government's action is consistent with the Takings Clause. In *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980), then-Justice Rehnquist's majority opinion held that the state's requirement allowing individu-

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[21] Additionally, the Dormant Commerce Clause precludes state and local governments from regulating Internet websites. See *Maine* v. *Taylor*, 477 U.S. 131, 138 (1986).

als "rights of free expression and petition on shopping center property clearly" was not an "unconstitutional infringement of * * * property rights under the Taking Clause." In *Dolan* v. *City of Tigard*, 512 U.S. 374, 394 (1994), Chief Justice Rehnquist's majority opinion held that a taking "different in character" from that in *PruneYard* could state a constitutional claim.

Because this case does not involve the designation of private property as a public forum, this case is outside the takings analysis entirely. That is likely why MNN has never made a takings argument. MNN had no private property rights in the public access channels. Moreover, there was no use of "the government's power to *redefine* the range of interests included in the ownership of property." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (emphasis added). Even if MNN has a property interest in the public access channels, nothing has ever been taken from it; the administrative authority over the channel that the City gave MNN has always been subject to the first-come, first-served requirement.

Second, the First Amendment generally precludes the government from obligating individuals or companies to speak, or to host others' speech. See, *e.g.*, *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n of Cal.*, 475 U.S. 1 (1986); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974).

But petitioners have not advanced any such argument. Nor could they. MNN entered into the CAO Agreement that provides MNN, among other things, substantial funding. As petitioners recognize (JA59-60), MNN agreed, as a condition of receiving funding,

that it may not engage in editorial curation or viewpoint discrimination on the government-provided channels. See pages 8-9, 26-28, *supra*.

MNN has continued to voluntarily accept this requirement. As MNN says in response to the frequently asked question "[w]hat can I put in my show," "MNN champions freedom of speech. You can take any political stance or preach any religious idea. You can also even record a flower for 28 minutes or play a uk[u]lele and sing expletives! We encourage you to use MNN as a platform to broadcast your voice to the world." *FAQs*, MNN, perma.cc/JL3B-HF7H. Far from objecting to being a first-come, first-served forum for speech, MNN has embraced that as its mission. Pet. App. 37a.

Even if MNN had objected, there is not "a plausible fear" here that viewers would attribute respondents' speech to MNN. *Rosenberger*, 515 U.S. at 841. Absent such a fear, requiring MNN to merely provide space for the speech does not unconstitutionally compel MNN to speak. See, *e.g.*, *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006); *PruneYard*, 447 U.S. at 87-88.[22]

Petitioners have never—here or below—raised either a takings or a compelled speech claim. That is for good reason, as neither doctrine provides petitioners any support in the context of this case. In different circumstances, however, these constitutional protections may limit state authority.

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[22] Because there is no claim by or against a cable operator, the First Amendment rights of cable operators are not implicated, either. See NCTA Br. 3. In particular, the viability of *Turner I* is not at issue.

II. Administering a public forum is a public function.

When a government assigns a public function to a nominally private actor, constitutional safeguards continue to apply. As this Court has long held, "[t]he State cannot avoid its constitutional responsibilities by delegating a public function to private parties." *Georgia* v. *McCollum*, 505 U.S. 42, 53 (1992).

Administering a public forum qualifies as such a public function. Were it otherwise, a municipality could bypass the First Amendment wholesale by interposing a nonprofit as the entity that approves demonstration permits for a public park or decides who may use school classrooms.

A. The Constitution governs the performance of public functions.

The Court has, "of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). A public function is that "which is traditionally associated with sovereignty." *Id.* at 353.

The Court was unanimous on this point in *Brentwood*. As the majority explained, "a nominally private entity" is treated "as a state actor" "when it has been delegated a public function by the State." *Brentwood*, 531 U.S. at 296. The dissent agreed that the Constitution applies when the entity is performing "a function that has been traditionally exclusively reserved to the State." *Id.* at 309 (Thomas, J.) (quotation omitted).

For their part, petitioners do not dispute that a government's delegation of a public function to a pri-

vate entity is a sufficient basis to find state action. See Pet'rs Br. 41. Chicago Access Corporation (CAC), however, asserts that there is some overlooked rule by which a private entity performing a public function does not qualify as a state actor to the extent that it allegedly "*violated* state law." CAC Br. 9.

Not only is that argument contrary to the unanimous views of the Court in *Brentwood*, but it is foreclosed by *West* v. *Atkins*, 487 U.S. 42 (1988), a case that CAC does not cite, much less discuss. *West* involves the state's sovereign authority to incarcerate convicted criminals and the Eighth Amendment's corresponding obligation "to provide adequate medical care to those whom it has incarcerated." *Id.* at 54. When "the State delegate[s] that function" to a private doctor, the doctor takes on a public function, subject to constitutional limits. *Id.* at 55-56. Private action alone cannot create this designation, because "[i]t is only those physicians authorized by the State to whom the inmate may turn." *Id.* at 55. In *West*, the doctor was alleged to have violated state negligence law, but he was subject to the Constitution all the same. *Id.* at 48 n.8.

West ultimately establishes that the state has a constitutional obligation "to provide medical treatment to injured inmates," and "the delegation of that traditionally exclusive public function to a private physician [gives] rise to a finding of state action." *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 55 (1999). That is a sufficient basis for a Section 1983 claim. See *West*, 487 U.S. at 49 ("[I]f a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, that conduct is also action under color of state law and will support a suit

under [Section] 1983.") (quotation and alteration omitted).

West is consistent with the Court's longstanding law that delegation of a traditional, exclusive public function is a sufficient basis to conclude that a nominally private entity "may fairly be said to be a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). *Lugar* itself identifies and endorses the propriety of "the 'public function' test." *Id.* at 939. *Lugar* denied state action in circumstances where there was *not* a delegated public function *and* the defendant acted in derogation of state law. See *ibid.* *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978), and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), are likewise inapposite, because neither involved delegation of an actual "public function."

A contrary result would leave a broad gap in the Constitution's protection of individual rights. If "[c]ontracting out" public functions to a private party "were the basis for delimiting [Section] 1983 liability, 'the state will be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to "private" actors, when they have been denied.'" *West*, 487 U.S. at 56 & n.14. While states have flexibility in how they wish to perform public functions, they have no flexibility to avoid the Constitution.

B. Administering a public forum is a public function.

Administration of a public forum is a traditional and exclusive state function. A state may not avoid the First Amendment by contracting the function out to a private entity.

1. This is not an open question; the Court resolved it in *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

Relying upon its early public forum cases, including *Hague*,[23] the Court identified the restrictions the First Amendment imposes on the ability of state actors to restrict speech rights in "streets" and "sidewalks." *Marsh*, 326 U.S. at 504 & n.1. The Court concluded that regardless of whether a corporation or municipality administers those forums, "the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." *Id.* at 506-507.

Marsh thus establishes that "the exercise of constitutionally protected rights on the public streets"—which are a quintessential public forum—"could not be denied by the owner," even where that entity is nominally private. *Evans*, 382 U.S. at 299. See also *Brentwood*, 531 U.S. at 313 (Thomas, J., dissenting) (*Marsh* recognized that administering "the streets of a company town" is state action); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 639 (1991) (O'Connor, J., dissenting) (*Marsh* held that a company town's "attempt[ing] to prohibit on its sidewalks certain protected speech" was a "traditional government function").

2. Even if the question were open, the answer remains. The function of administering a designated public forum exclusively and traditionally rests with the state.

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[23] *Perry* identifies Justice Roberts' opinion in *Hague* as a foundational authority regarding public forums. See 460 U.S. at 45.

To begin with, the power to designate a public forum is an exclusive state function. A public forum is that which the "government" has "lawfully dedicated" as a place where the "principal purpose [is] the free exchange of ideas." *Krishna Consciousness*, 505 U.S. at 678-680. Government "inaction" cannot "create a public forum." *Id.* at 680. Nor can a private party create a public forum; even if a private entity opens a place for the public to speak, that is not a "public forum" within the meaning of the First Amendment. *Ibid.*

What is more, the power to administer a "public forum" lies exclusively with the state or its delegee. Absent a delegation from the state, private parties categorically cannot determine who has access to public parks or public classrooms. This is thus an exclusive function of the state, inherently tied to sovereign authority.

This is also the sort of function to which the Constitution directly speaks. As this Court has long identified, the First Amendment strongly protects speech in a public forum. See *Rosenberger*, 515 U.S. at 829; *Police Dep't of City of Chi.* v. *Mosley*, 408 U.S. 92, 96 (1972). That the Constitution bears specifically on this particular sovereign function helps confirm that it is among the narrow range of "public functions."

Administration of a public forum is also traditionally a state function. As Justice Roberts said long ago, "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public

questions." *Hague*, 307 U.S. at 515. Such forums—and their regulation—have existed since "ancient times." *Id.* at 515-516.

These points are all parallel to the holding in *West*. Only a government, exercising sovereign authority, can hold individuals prisoner; thus, providing services to those individuals requires sovereignty. See *West*, 487 U.S. at 55-56. And the Eighth Amendment protects prison inmates against cruel and unusual punishment (*id.* at 56), just as the First Amendment protects speakers in public forums.

Meanwhile, administering a public forum is distinct from non-sovereign functions that are not the exclusive prerogative of the state. Running a public utility, for example, does not qualify as a public function because it does not depend on "sovereign[]" authority; non-sovereigns can and do run utilities. *Jackson*, 419 U.S. at 353. Likewise, the education of special-needs students is not the "exclusive province of the State." *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982).

The lower courts agree that administering a public forum is a public function. See Pet. App. 19a (Lohier, J., concurring) ("A private entity's regulation of speech in a public forum is a public function when the State has expressly delegated the regulatory function to that entity."); *Watchtower Bible & Tract Soc'y* v. *Sagardia De Jesus*, 634 F.3d 3, 10 (1st Cir. 2011); *United Church of Christ* v. *Gateway Econ. Dev. Corp.*, 383 F.3d 449, 454-455 (6th Cir. 2004); *Lee* v. *Katz*, 276 F.3d 550, 555 (9th Cir. 2002).

3. Petitioners, trying to make this case about *all* public access channels, characterize the relevant function as "[t]he provision of cable television gener-

ally" or "public access channels in particular." Pet'rs Br. 43. These, petitioners contend, are not functions "*traditionally* provided by government." *Ibid.*

That is not our argument. As a section heading in our brief opposing certiorari made clear, our contention is that "[a]dministering *public forums* is a public function." Opp. 21 (emphasis added).

The closest petitioners come to engaging this point is their recognition of Judge Lohier's concurrence, explaining that "New York City delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels." Pet. App. 21a. Petitioners respond that this "improperly assumes the antecedent." Pet'rs Br. 44. A finding of a public forum is of course the first step to this analysis. If, however, we are right about the antecedent, petitioners have no substantive argument. And we have explained why petitioners are flatly wrong to assert that the City lacks control as to the public access channels. See pages 33-38, *supra*.

By contrast, administering a gathering place that is *not* a "public forum" within the meaning of the First Amendment is not a public function. For example, because they do not qualify as traditional or designated public forums, the First Amendment does not govern privately-owned shopping malls. See, *e.g.*, *Hudgens* v. *NLRB*, 424 U.S. 507, 508, 522 (1976).

4. While our argument focuses on the public function analysis, "the direct and indispensable participation" of what is "beyond all question * * * a state actor" helps confirm the presence of state action. *Edmonson*, 500 U.S. at 624.

MNN's existence derives from sovereign acts. New York City incorporated MNN and appointed its initial board. See page 7 n.1, *supra*. MNN administers the public access channels solely because the City created them and designated MNN as the administrator. See pages 7-9, 33-38, *supra*. Meanwhile, the City retains discretion to replace MNN. See pages 36-37, *supra*. And MNN depends upon the City's coercive funding; the City obligates cable operators to fund MNN. See pages 8-9, *supra*.

To be clear, we do not maintain that the sovereign's creation and maintenance of a nominally private entity alone compels the finding of state action. But these unique circumstances further militate in favor of the result reached below.[24]

5. There is an additional basis to conclude that MNN's conduct with respect to its content decisions qualifies as state action. State law wholly dictates the terms on which MNN airs content. The first-come, first-served mandate imposed by law and contract displaces any independent decision-making and strips MNN of editorial discretion. State law also compels MNN to provide free access to users. And

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[24] Petitioners suggest that respondents could seek relief from the New York Public Service Commission. See Pet'rs Br. 59-60. They do not, however, assert that this has any bearing on respondents' claims here. A state cannot avoid constitutional claims by creating an administrative agency; "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under [Section] 1983." *Zinermon* v. *Burch*, 494 U.S. 113, 124 (1990). Nor is there any basis to conclude that the state agency actually adjudicates *First Amendment* claims or provides remedies commensurate with a constitutional claim. Indeed, respondents *tried* to bring such a claim, but they secured no remedy. See Dist. Ct. Dkt. No. 49.

MNN's authority rests on a delegation of power from New York City. The City, meanwhile, maintains control over the public access channels. As *amicus* ACLU argues, in the entirety of these unique circumstances, MNN engages in state action when making content decisions. See *National Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179 (1988); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970).

C. The public function doctrine precludes circumvention of the First Amendment.

As *Rosenberger*, *Good News Club*, *Marsh*, and others hold, the public forum doctrine precludes discrimination against disfavored speakers. Yet if the First Amendment did not apply when the government appointed a nonprofit to administer the forum, such discrimination would become commonplace.

Take *Lamb's Chapel*. Once the school board opened school facilities for "social, civic and recreational meetings," it could not deny access to an evangelical church on the basis of its views. 508 U.S. at 397. But under petitioners' theory, if the school interposed a nonprofit to serve as facility gatekeeper, such denials would be constitutional. That is not, and should not become, the law. Holding otherwise would destabilize fundamental First Amendment protections, with the predictable result of harming politically disfavored groups.

* * *

This case illustrates that, in our federal system, state and local governments are free to make different policy decisions. Some of those choices have constitutional ramifications. New York has made a unique, freedom-enhancing decision to open a partic-

ular kind of public forum to its citizens. Its ability to make this choice deserves respect.

CONCLUSION

The Court should affirm the judgment entered below.

Respectfully submitted.

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JANUARY 2019

APPENDICES

APPENDIX A

Cable Franchise Agreement
by and between
The City of New York
and
Time Warner Entertainment Company, L.P.

* * *

THIS AGREEMENT (this "Agreement") is entered into by and between the City of New York ("the City"), a validly organized and existing political subdivision of the State of New York, and Time Warner Entertainment Company, L.P., a limited partnership duly organized under the applicable laws of the State of Delaware ("Franchisee").

WHEREAS, the City is a "franchising authority" in accordance with Title VI of the Communications Act, (see 47 U.S.C. § 522(10)) and is authorized to grant one or more nonexclusive cable franchises pursuant to Article 11 of the New York Public Service Law, as amended, and Title 16, Chapter VIII, Parts 890.60 through 899, of the Official Compilation of Codes, Rules and Regulations of the State of New York, as amended; and

WHEREAS, pursuant to Section 363(a) of the New York City Charter (the "City Charter"), franchises are to be awarded by the City in accordance with the provisions of authorizing resolutions adopted by the City Council of the City (the "City Council"); and

WHEREAS, the City Council adopted Resolution No. 538 on September 27, 2006 (the "Resolution")

which authorizes, until September 27, 2011, the Department of Information Technology and Telecommunications ("DoITT") to grant nonexclusive franchises for the provision of cable television services; and

WHEREAS, on September 16, 1998 a franchise agreement was executed between the City and Franchisee (or the predecessor in interest to Franchisee) granting a franchise for the provision of certain services in the Franchise Area (as hereinafter defined), pursuant to the terms described therein, said franchise agreement referred to hereinafter as the "1998 Franchise"; and

WHEREAS, the scheduled term of the 1998 Franchise expired on September 16, 2008, and Franchisee sought a renewal of its rights to provide Cable Services in the Franchise Area (as hereinafter defined) pursuant to the terms of this Agreement and 47 U.S.C. § 546; and

WHEREAS, the City, pursuant to the terms of the Cable Act (as hereinafter defined), has identified the City's future cable-related community needs and interests and, pursuant to the City Charter, has issued a solicitation for cable television franchise renewals (the "Solicitation") to which Franchisee responded; and

WHEREAS, in response to the Solicitation, Franchisee submitted materials regarding the terms and conditions for its continued operation and maintenance of its Cable System and provision of Cable Services (as hereinafter defined) and other matters; and

WHEREAS, Franchisee and the City have completed arm's-length negotiations regarding the terms and conditions pursuant to which the City intends to grant to Franchisee, and Franchisee intends to accept

from the City, a franchise (the "Franchise") described generally in Section 4.1 hereof and more specifically renewing Franchisee's rights to provide Cable Services in the Franchise Area (as hereinafter defined) pursuant to 47 U.S.C. § 546 and pursuant to the complete terms of this Agreement; and

WHEREAS, the City has, with respect to such proposed renewal franchise, complied with the New York State Environmental Quality Act ("SEQRA") (Section 8-0101 *et seq.* of the New York State Environmental Conservation Law), the SEQRA regulations set forth at Part 617 of Title 6 of the New York Code of Rules and Regulations, and the City Environmental Quality Review process (Chapter 5 of Title 62 and Chapter 6 of Title 43 of the Rules of the City of New York); and

WHEREAS, the Department of City Planning has determined pursuant to Section 363(c) of the City Charter that the franchise renewal granted pursuant to and consistent with the terms of the Solicitation would not have land use impacts or implications and therefore is not subject to the Uniform Land Use Review Procedure ("ULURP") set forth in Section 197-c of the City Charter; and

WHEREAS, Franchisee has completed all required submissions under the City's VENDEX process, and the City's review thereof has been completed; and

WHEREAS, pursuant to Section 371 of the City Charter, the Franchise and Concession Review Committee (the "FCRC") held a public hearing on a proposed franchise for Franchisee, with respect to the Franchise Area, and including terms of an agreement

memorializing the terms and conditions of the proposed franchise; and

WHEREAS, said hearing before the FCRC was held within 30 days of the date that DoITT filed a proposed franchise agreement with the FCRC; and

WHEREAS, a notice of said hearing and a summary of the terms and conditions of the proposed Franchise were properly published in the City Record; and

WHEREAS, at least 15 days, excluding Sundays and legal holidays, elapsed between publication of said hearing notice and summary in the City Record and the commencement of such hearing before the FCRC; and

WHEREAS, before the FCRC hearing, the requirements regarding publication of notice of such hearing as set forth in Section 371 of the City Charter were met; and

WHEREAS, the FCRC has approved the grant to Franchisee of the Franchise and the terms of this Agreement as described herein; and

WHEREAS, pursuant to Section 895.1 of Title 16 of the New York Code of Rules and Regulations, Franchisee's technical ability, financial condition, and character were considered and approved by the City in a full public proceeding affording due process; Franchisee's plans for its Cable System (as hereinafter defined) were considered and found to be adequate and feasible in a full public proceeding affording due process; the Franchise complies with the franchise standards of the NY PSC (as hereinafter defined); and the Franchise is nonexclusive; and

WHEREAS, the City, following said public proceeding, determined that this Franchise granting Franchisee a nonexclusive franchise complies with the franchise standards set forth in the Cable Act, the Resolution, the aforementioned Public Service Law, the regulations of the NY PSC (including any necessary waivers that the parties may seek and obtain) and all other applicable laws and regulations; and

WHEREAS, the City and Franchisee have determined that this Agreement complies with the franchise standards set forth in the Resolution, Section 363 of the City Charter, Section 626 of the Cable Act as amended, Section 222 of the Public Service Law, the regulations of the NY PSC, and all other applicable laws and regulations; and

WHEREAS, the City and Franchisee have reached agreement on the terms and conditions set forth herein and the parties have agreed to be bound by those terms and conditions.

NOW, THEREFORE, in consideration of the foregoing clauses, which clauses are hereby made a part of this Agreement, the mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged,

THE SIGNATORIES DO HEREBY AGREE AS FOLLOWS:

* * *

1. DEFINITIONS

* * *

1.18 *Community Access Organization (or "CAO"):* Shall mean the nonprofit corporation that has been

designated by the Borough President, as described in Section 8.1.7 of this Agreement, for the purposes described in that section.

* * *

1.47 *Public Rights-of-Way:* The surface of, and the space above and below, any and all streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers, public grounds and public places or waters within and belonging to the City and any other property within the City, to the extent to which there exist public easements or public rights of way.

* * *

3. EFFECTIVE DATE AND TERM:

3.1 *Effective Date and Term:*

(a) *Effective Date & Scheduled Termination Date:* This Agreement and the Franchise granted herein shall become effective on the date that the NY PSC issues a certificate of confirmation for this Franchise (the "Effective Date") following the Closing (which certificate Franchisee shall submit all required applications for within 30 days of the Closing); provided that implementation of this Agreement shall be subject to the applicable registration provisions of City Charter sections 375 and 328. The term (the "Term") of this Agreement and the Franchise granted herein shall run from the Effective Date until (but not including) July 18, 2020 (the "Scheduled Termination Date"), unless the Franchise is earlier terminated as provided herein. Franchisee shall memorialize the Effective Date by notifying the City in writing of the occurrence

of said Effective Date, which notification shall become a part of this Franchise.

* * *

4. GRANT OF AUTHORITY; LIMITS AND RESERVATIONS

4.1 *Grant of Authority:* (a) The City hereby grants Franchisee, subject to the terms and conditions of this Agreement, a nonexclusive franchise providing the right and consent to install, operate, repair, maintain, remove and replace cable, wire, fiber optic lines or other transmission medium that may be used in lieu of cable, wire or fiber optic lines for the same purposes, and related equipment and facilities, on, over and under the Public Rights-of-Way in order to provide Cable Services. The City and Franchisee agree that this franchise is a grant of the right to provide cable service pursuant to 47 U.S.C. § 541. It is the City's position that authorization to install non-closed path transmission facilities, such as antennae and related equipment, on, over or under the Public Rights-of-Way is not granted pursuant to this Agreement, although Franchisee is permitted to separately seek a franchise granting such authorization. It is the City's position that the franchise granted hereunder does not include the right or consent to use the Public Rights-of-Way for the transmission of any Information Service or Telecommunications Service, unless such authority is expressly granted hereinafter, although to the extent not thus expressly granted hereinafter Franchisee is permitted to separately seek authority from the City granting such authorization. It is the City's position that the franchise granted hereunder does not include the right or consent to install, maintain or operate any computer kiosks or other similar facilities on the Public Rights-of-Way

the purpose of which is the reception and use of an Information Service, or any other service, by pedestrians, vehicles or others users or occupants of the Public Rights-of-Way, although Franchisee is permitted to separately seek authority from the City granting such authorization. Franchisee does not agree with all of these positions of the City, as it believes the City's grant of a franchise hereunder, as a matter of law, provides Franchisee with certain additional rights, and Franchisee reserves all rights, and does not waive any rights, in that regard.

(b) Without limiting the City's authority to argue that separate and additional franchise rights are required to provide Non-Cable Services where, as in this Agreement, it is the City's position that the right to offer such Non-Cable Services has, by express reservation, not been granted, to the extent Non-Cable Services are in fact provided by Franchisee pursuant to claimed legal authority rather than pursuant to one or more separately granted, express written franchises from the City, such shall be referred to in this Agreement as "Additional Provided Services".

(c) The City and Franchisee each reserve all of their respective rights with respect to Franchisee's provision of Non-Cable Services (including as provided in the preceding subsections (a) and (b)); provided, however, that the City agrees that, absent any modification or clarification of existing law, the City will resolve any dispute between the City and Franchisee as to such Non-Cable Services solely by means of an action for declaratory judgment, and shall not contend that Franchisee's provision of Non-Cable Services without the payment, under this Agreement, of franchise or other fees with respect to such services

constitutes a Default as defined in Article 15 of this Agreement.

* * *

8. PEG SERVICES

8.1 *PEG Set Aside:* In order to ensure universal availability of Public, Educational and Government Access programming, Franchisee shall provide on the Basic Service tier use of seventeen (17) Access Channels in total, subject to, and phased in over the Term as set forth below in, this Section 8.1:

8.1.1 *Continuing Public Access Channels:* Throughout the Term, four (4) Public Access Channels.

8.1.2 *Continuing Government/Educational Access Channels:* Throughout the Term, five (5) Government/Educational Access Channels, one of which is designated by the City for educational Access Channel programming.

8.1.3 *Additional Access Channels:* In addition to providing the Access Channels described in Sections 8.1.1 and 8.1.2 above, Franchisee shall provide the City with the following additional Access Channels on the Basic Service tier, subject to the conditions set forth below:

8.1.3.1 Commencing not later than sixty days after the Effective Date and thereafter throughout the Term, Franchisee shall provide: (i) an additional two (2) Public Access Channels; and (ii) one (1) additional Government/Educational Access Channel.

8.1.3.2 Commencing not later than the later to occur of (x) January 1, 2012, and (y) the one hundred eightieth (180th) day after Franchisee's receipt of a written request from the City for such additional

channels, and then thereafter throughout the Term, Franchisee shall provide to the City: (i) one (1) further additional Public Access Channel; and (ii) two (2) further additional Government/Educational Access Channels.

8.1.3.3 Commencing not later than the later to occur of (x) July 15, 2014, and (y) the one hundred eightieth (180th) day after Franchisee's receipt of a written request from the City for such additional channels, and then thereafter throughout the Term, Franchisee shall provide to the City a further additional two (2) Public Access Channels.

8.1.3.4 No single additional Government/Educational Access Channel or additional Government/Educational Access Channels to be provided pursuant to this Section 8.1.3 shall be activated by Franchisee unless (a) the City has provided notice to Franchisee that additional programming is available for each such additional channel, and (b) all existing Government/Educational Access Channels are providing original, non-text, non-duplicative programming for at least eighty percent (80%) of the time between 6:00 AM and 12:00 AM for the preceding six (6) consecutive months. With respect to Public Access Channels, no single additional Public Access Channel or additional Public Access Channels to be provided pursuant to this Section 8.1.3 shall be activated by Franchisee unless all existing Public Access Channels are providing programming for at least eighty percent (80%) of the time between 6:00 AM and 12:00 AM for the preceding six (6) consecutive months.

8.1.4 *Fallow Time:* In the event that one or more Public or Government/Educational Access Channels are not being utilized by the City or the CAO's, the

provisions of 16 NYCRR 895.4 (c)(12) shall be applicable.

8.1.5 The City hereby authorizes Franchisee to transmit on the Access Channels the Access Channel programming the City submits to Franchisee for such transmission.

8.1.6 (a) All Access Channels shall be provided to Subscribers as part of the same tier of Service as are all those signals (hereinafter "must-carry signals") carried in fulfillment of the requirements of 47 U.S.C. §§ 534 and 535 (provided, however, that Franchisee reserves the right to claim that such a franchise requirement regarding the tier on which Access Channels must be carried is preempted, in whole or in part, by federal law). Provision of Access Channels on "the same tier of service" as must-carry signals, as that concept is expressed in the preceding sentence, shall mean provision of such channels for a package price (for a package of services which include the Access Channels, the must-carry signals and any other channels Franchisee in its discretion chooses to include in such tier). Notwithstanding the preceding provisions of this Subsection 8.1.6(a), (i) while the City and Franchisee each reserve all rights with respect to the format in which Franchisee provides Access Channels, the City agrees not to object to Franchisee's provision of the additional Access Channels required pursuant to Sections 8.1.3, 8.1.3.1, 8.1.3.2 and 8.1.3.3 hereof (as well as one existing Government/Educational Access Channel) in digital format even if other channels that are part of the Basic Service tier are provided in analog format; and (ii) the Commissioner, in his or her discretion, may approve the provision of any Government/Educational or (after consultation with the Community Access Organization) Public Access

Channel in any manner that varies from said provisions upon a determination that such variance would be in the City's interest.

(b) Franchisee shall carry Access programming on each of the respective Public or Government/Educational Access Channels as indicated in Appendix J. In the future, Franchisee shall assign the Public or Government/Educational Access Channels on its channel line up as configured elsewhere within the City to the extent such channel assignments do not interfere with any other channels or fall outside the range of the Franchisee's respective channel lineup. Franchisee shall not arbitrarily or capriciously change such channel assignments, and Franchisee shall minimize the number of such changes; provided, however, that Franchisee may change such channel assignments as it deems appropriate so long as (i) Franchisee gives the appropriate CAO or the Government/Educational Access Channel programmer ninety (90) days notice of such change (if commercially practicable) but in no event less than forty-five (45) days, and (ii) Franchisee provides, free of charge, public announcements of such changes that shall include (A) to the extent Franchisee has advertising availability, advertising such Public or Government/Educational Access Channel change on advertising inserts on local channels carrying non-satellite programming in prime time at least thirty (30) seconds per day for the time period of thirty (30) to fifteen (15) days prior to such change and two (2) minutes per day for the fourteen (14) days prior to such change (provided, however, that if Franchisee does not have advertising availability at the commencement of the thirty (30) to fifteen (15) day period, as soon as advertising space becomes available, Franchisee shall then provide the advertising contemplated under this Subsection

8.1.6), and (B) providing notice of such change in at least two monthly Subscriber bill inserts prior to such change (if commercially practicable) but in no event less than one monthly Subscriber bill insert; provided, however, that such bill inserts shall not be necessary in the event the Franchisee provides the requisite notice of such changes to all Subscribers in a letter separate from their bill.

(c) Notwithstanding the preceding subsection (b), but subject to applicable law, Franchisee shall retain, throughout the Term, Channel Positions for Government/Educational Access Channels at Channel Positions 74 and 75, unless the Commissioner in the Commissioner's reasonable discretion approves other Channel Positions for such channels upon a written request by Franchisee (with supporting documentation), provided, however, that nothing in this Section 8.1.6(c) shall be construed to require Franchisee to allocate Channel Positions in a manner that conflicts with existing and/or any future applicable law governing the location of Channels, including, without limitation, the signal carriage and positioning requirements set forth in 47 C.F.R. §§ 76.51-76.70 and 47 U.S.C. §§ 534 and 535, as such may be amended or superseded during the Term of this Agreement. To the extent that Franchisee enters into an agreement with the Community Access Organization regarding Channel Positions for one or more of the Public Access Channels, then notwithstanding anything to the contrary herein, the Channel Positions for Public Access Channels as specified by such agreement, so long as it is in effect, shall be deemed to be required hereunder in lieu of any contrary provisions of this Agreement (except to the extent such affect the Channel Locations for Government/Educational Access Channels,

in which event the provisions of this Agreement shall prevail).

8.1.7 The City shall provide a suitable video signal and a suitable audio signal for each Government/Educational Access Channel. Franchisee, upon receipt of the suitable video signal, shall provide, install and maintain in good working order the equipment necessary for transmitting the Government/Educational Access Channel signal to the channel aggregation site for further processing for distribution to Subscribers. Franchisee's obligations with respect to such upstream transmission equipment and facilities shall be subject to the availability, without charge to Franchisee, of suitable required space, environmental conditions, electrical power supply, access, pathway, and facilities and such cooperation of the City as is reasonably necessary for Franchisee to fulfill such obligations; provided, however, that neither Franchisee nor the required site work contemplated hereunder shall impose any unreasonable material burdens on the City.

8.1.7.1 Such upstream transmission provided by Franchisee shall comply with applicable FCC standards governing the transport and distribution of Government/Educational Access Channel signals to Subscribers. If Franchisee makes changes to the Cable System that require improvements to Government/Educational Access Channel facilities to continue to be used as they were intended under the terms of this Agreement, then Franchisee shall, without charge to the City, make such changes in either the equipment and facilities referred to in this Subsection 8.1.7 or in Franchisee's video channel aggregation point and distribution equipment and facilities

in order to permit the continuation of such intended use.

8.1.7.2 The Government/Educational Access Channels shall be placed under the jurisdiction of the Mayor and shall be for the noncommercial use of the City, for noncommercial use by New York City public schools and the New York City Board of Education and other not-for-profit educational institutions chartered or licensed by the New York State Department of Education or Board of Regents in the Franchise Area as specified by the City.

8.1.7.3 *Government/Educational Access Video on Demand:* In addition to the dedicated Government/Educational Access Channels described in Sections 8.1.2 and 8.1.3 hereof, Franchisee shall also provide to the City capacity on its video on demand server equipment, up to maximum capacity of 25 hours of standard definition programming, for Government/Educational Access Programming (defined below), such that VOD-enabled Subscribers will be able to select and watch such programs on a program-by-program basis using the video on demand system that Franchisee uses to offer other programming on a video on demand basis. Notwithstanding the preceding sentence, however, Franchisee's obligation under said sentence shall be limited to the provision of capacity for Government/Educational Access Programming which is delivered by the City in properly encoded form for use in video on demand systems. As used in this Section 8.1.7.3, the term Government/Educational Access Programming means programming which is, has been or could be provided on a Government/Educational Access Channel in accordance with the terms of this Agreement and applicable law.

8.1.7.4 *High Definition Access Channel:* Upon no less than ninety (90) days written notice from the City to Franchisee, one of the Government/Educational Access Channels being provided by Franchisee pursuant to this Section 8 shall, at the City's option, be provided in high-definition format (with a minimum resolution of 720p or 1080p resolution, the choice of such resolution to be at the City's option, provided such format is being used by Franchisee for at least five other high-definition programming services on the System). If the City is not capable of producing and delivering programming in the selected high definition format by the date described in the preceding sentence, then the obligation of Franchisee to transmit such programming in said format shall be delayed until such capability is achieved.

8.1.8 *Community Access Organizations:* The Manhattan Borough President has designated an independent, not-for-profit, nonmembership corporation, organized pursuant to the New York Not-for-Profit Corporation Law, to serve as the CAO for the Borough, under whose jurisdiction the Public Access Channels shall be placed for purposes of Article 8 of this Agreement. The CAO shall undertake such activities and shall adopt such rules and regulations as are required, and may adopt rules and regulations not inconsistent with this Agreement, the CAO Agreement (as hereinafter defined), a form of which is attached as Appendix C to this Agreement, the Certificate of Incorporation of the CAO, the By-Laws of the CAO, the rules and regulations of the NY PSC, and applicable law. The CAO shall maintain tax-exempt status under Section 501(c) of the Internal Revenue Code of 1986, as amended.

8.1.9 *Use of Public Access Channels.* The Public Access Channels for the Borough shall be under the jurisdiction of the CAO. Such Public Access Channels shall be used for the purpose of distributing noncommercial services by the public, any other charitable, nonprofit purpose or other similar purpose, including, without limitation, the generation of revenues by activities reasonably related to such uses and purposes, or any other purpose agreed to between Franchisee and the CAO.

8.1.9.1 *Public Access Interconnection:* Franchisee shall effectuate the interconnection of any Public Access Channel facilities with the Cable System for purposes of transmitting the Public Access Channels contemplated in this Article 8 in accordance with the terms of the CAO Agreements (as hereinafter defined).

8.1.10 *No Editorial Control by Franchisee:* Consistent with applicable law, Franchisee shall not exercise editorial control over programming or distribution of services over any Access Channel used by any Person(s), so long as such Access Channel is being used for the purposes authorized herein and except where Franchisee is utilizing any such Access Channel pursuant to the fallow time provisions of the Cable Law.

8.1.11 *Access Channel Quality:* Each Public and Government/Educational Access Channel shall be delivered with transmission quality at least the same as the transmission quality of any other channel on Franchisee's Basic Service tier of service that is not an Access Channel; provided, however, that Franchisee shall have no responsibility to improve upon or modify the quality of any Public or Government/Educational Access Channels content provided to Franchisee by

any Public or Government/Educational Access Channel programmer.

8.1.12 *Public Access Video on Demand and High Definition:* In addition to, and not in lieu of, the requirements described above in Sections 8.1.7.3 and 8.1.7.4, to the extent that Franchisee and the CAO have agreed pursuant to separate agreement that Franchisee will provide video on demand and/or high definition, such agreements by Franchisee shall be considered obligations of Franchisee hereunder as if expressly included herein.

8.2 *Government and Educational Access Grant:* Franchisee, together with the other TWC Franchisees, shall provide a combined, annual grant payable to the City to be used in support of the local Government/Educational Access Channel capital needs (the "Annual G/E Grant"). The amount of each Annual G/E Grant shall be an amount calculated by dividing Six Million Fifty Thousand Dollars ($6,050,000.00) by the number of payment due dates which are scheduled to occur prior to July 18, 2020. The first such annual payment shall be due on the sixtieth (60th) day after the Effective Date and each subsequent annual payment shall be due on the sixtieth (60th) day after each anniversary of the Effective Date.[1] Such grant shall be used solely by the City for Government/Educational Access Channel capital costs. Upon request by Franchisee, the City shall provide Franchisee with a complete accounting annually of the distribution of funds granted pursuant to this Section 8.2. In addition, Time Warner Franchisees will collectively pro-

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[1] If, for example, the Effective Date occurs before May 19, 2012, the amount of each Annual G/E Grant will be $672,222.

vide $1.7 million of in-kind support through the cablecasting of thirty second PSAs regarding WNYE's channels as follows:

Year	Amount	# of PSAs @ 500
1	$475,000	950
2	432,000	865
3	432,000	865
4	60,000	120
5	60,000	120
6	60,000	120
7	60,000	120
8	60,000	120
9	60,000	120

8.3 *Community Access Grant:* Franchisee shall pay to the CAO certain funding (the "CAO Grant") pursuant to the terms of a Community Access Organization Grant and Use Agreement by and between the CAO and Franchisee (the "CAO Agreement"), substantially in the form attached hereto as Appendix C. Franchisee and the City acknowledge and agree that, consistent with applicable federal and state law, the City shall not exercise any editorial control over any programming carried on any Access Channels set aside for the CAO pursuant to this Agreement or the CAO Agreement. The CAO Grant, or any portion thereof, shall not constitute or be treated as a deduction or credit against Franchise Fees payable to the City by Franchisee pursuant to this Agreement (nor shall any provision of services or funds to the City pursuant to this Agreement constitute or be treated as such a deduction or credit).

8.4 *Franchisee PEG Liability Immunity:* In accordance with 47 U.S.C. §558, Franchisee shall not incur any liability arising from or in connection with any Access Channels.

8.5 *Recovery of Costs:* To the extent permitted by federal law, Franchisee shall be allowed to recover the costs of the grants referenced in this Article 8 and Section 5.6 from Subscribers and to include such costs as a separately billed line item on the applicable Subscribers' bills. Without limiting the forgoing, if allowed under state and federal laws, Franchisee may externalize, line-item, or otherwise pass-through interconnection and any franchise-related costs to Subscribers.

* * *

13. TRANSFER OF FRANCHISE

13.1 *City Approval Required:* The ownership and control structure of the Franchisee as of the date of execution of this Agreement is set forth in Appendix B hereof. Subject to the provisions of this Article, Franchisee shall apply to the City for approval of any transaction in which any change is proposed with respect to ten percent (10%) or more for voting interests or twenty-five percent (25%) or more for non-voting interests of the ownership of Franchisee, the Cable System, the Cable System assets, or the Franchise by submitting FCC Form 394 or such other form as the FCC may prescribe for that purpose; provided, however, that the foregoing requirements of this Section 13.1 shall not be applicable with respect to: (a) transfers of any ownership interests expressly permitted in the "Permitted Transfers" section, if any, of Appendix B; or (b) which are effectuated as a result of any transactions involving the exchange of publicly traded

shares. The application shall be made at least one hundred twenty (120) calendar days prior to the contemplated effective date of the transaction. Such application shall contain complete information on the proposed transaction, including details of the legal, financial, technical, and other qualifications of the transferee. At a minimum, the following information must be included in the application:

13.1.1 all information and forms required under federal law;

13.1.2 any shareholder reports or filings with the Securities and Exchange Commission that pertain to the transaction;

13.1.3 a report detailing any changes in ownership of voting or non-voting interests of over five percent (5%);

13.1.4 other information necessary to provide an accurate understanding of the financial position of the Cable System before and after the proposed transaction;

13.1.5 information regarding any potential impact of the transaction on Subscriber rates and service; and

13.1.6 any contracts that relate to the proposed transaction as it affects the City and, upon request by the City, all documents and information that are related or referred to therein and which are necessary to understand the proposed transaction; provided, however, that if Franchisee believes that the requested information is confidential and proprietary, then Franchisee must provide the following documentation to the City: (i) specific identification of the information; (ii) a statement attesting to the reason(s) Franchisee believes the information is confidential;

and (iii) a statement that the documents are available at Franchisee's designated offices for inspection by the City.

* * *

15. DEFAULT AND REMEDIES

15.1 *Defaults.* In the event of any breach, default, failure or other noncompliance by Franchisee in the performance of any obligation of Franchisee under this Agreement (each such breach, default, failure or other noncompliance being referred to herein as a "Default"), which Default is not cured within the specific cure period provided for in this Agreement (or if no specific cure period is provided for in this Agreement then within the cure period described in Section 15.3 below), then the City may:

15.1.1 make a demand upon the Performance Bond pursuant to the provisions of Section 15.9 herein;

15.1.2 draw down on the Letter of Credit pursuant to the provisions of Section 15.10 herein;

15.1.3 cause a withdrawal from the cash Security Fund, pursuant to the provisions of Section 15.11 herein;

15.1.4 pursue any rights the City may have under the Guaranty;

15.1.5 seek and/or pursue money damages from Franchisee as compensation for such Default (including, as applicable, liquidated damages as contemplated in Section 15.13 hereof);

15.1.6 seek to restrain by injunction the continuation of the Default; and/or

15.1.7 pursue any other remedy permitted by law, or in equity, or as set forth in this Agreement; provided, however, that the City shall only have the right to terminate this Agreement upon the occurrence of a Revocation Default (defined hereinafter).

* * *

APPENDIX B

COMMUNITY ACCESS ORGANIZATION ("CAO")

GRANT AND USE AGREEMENT

BY AND BETWEEN

TIME WARNER ENTERTAINMENT COMPANY, L.P.

AND

MANHATTAN COMMUNITY ACCESS CORPORATION

D/B/A MANHATTAN NEIGHBORHOOD NETWORK

CAO GRANT AND USE AGREEMENT

THIS AGREEMENT (the "Agreement") made on this ___ day of _____, 2011, is entered into by and between Time Warner Entertainment Company, L.P., a limited partnership duly organized under the applicable laws of the State of Delaware and Time Warner NY Cable LLC a limited liability company duly organized under the applicable laws of the State of Delaware (together referred to herein as "Time Warner Cable"), with their place of business at 120 East 23rd Street, New York, New York 10010 and Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network, a New York not-for-profit corporation (the "CAO") designated by the Borough President of Manhattan (the "Borough President"), with a place of business at 537 West 59th Street, New York, New York 10019.

WHEREAS, the City of New York (the "City"), is entering into Franchise Agreements granting Time

Warner Cable nonexclusive franchises ("Franchise Agreements") to operate a Cable System (the "System") in the Borough of Manhattan (service area hereinafter defined); and

WHEREAS, Time Warner Cable has directly and independently negotiated with the CAO and has agreed to provide the CAO with the grants and services pursuant to the terms hereof for the benefit of the Residents of the Borough of Manhattan; and

WHEREAS, the Franchise Agreement requires Time Warner Cable to make available CAO Access Channels on the System, to be known as public access channels ("Public Access Channels"), to fulfill certain technical requirements with respect to such channels and to provide to the CAO any support payments and Cash Grants (as hereinafter defined) as may be agreed upon between the CAO and Time Warner Cable as described herein; and

WHEREAS, the CAO is a not-for-profit corporation organized pursuant to New York State law and has been designated by the Borough President as the CAO to receive such grants as shall be made available by Time Warner Cable pursuant to this Agreement; and

WHEREAS, the CAO has been organized to operate for charitable and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1954, as amended (the "Code"), including, among other purposes, the administration and management of Public Access Channels in the Borough, and such other purposes which shall qualify the CAO as exempt under Section 501(c)(3) of the Code; and

WHEREAS, the CAO shall obtain the funds necessary to carry out its purposes and objectives from

the grants provided for herein and from any other lawful sources; and

WHEREAS, Time Warner Cable desires to support the purposes and objectives of the CAO in the CAO's objectives of the development and production of public services and programming to be distributed on the Public Access Channels and to be made available to all cable television subscribers in the Borough of Manhattan; and

WHEREAS, the CAO will engage in activities and will develop programming to be distributed on the Public Access Channels for the benefit of Subscribers to the System, thereby increasing the public service potential of cable television in the City;

NOW THEREFORE, in consideration of the foregoing clauses, which clauses are hereby made a part of this Agreement, and the mutual agreements herein contained, the parties agree as follows:

* * *

SECTION II - GRANT OF SUPPORT TO THE CAO

2.1 Public Access Channel Grant

2.1.01 Time Warner Cable shall make a Public Access Channel grant to be used in support of the CAO's development and production of local public access programming ("Public Access Channel Grant").

2.1.02 The Public Access Channel Grant provided by Time Warner Cable hereunder shall be in the form of a per month, per Subscriber grant for the Term of the Franchise Agreement in accordance with the following schedule:

Year 1 - Year 2: The Public Access Channel Grant shall be in the amount of NINETY CENTS ($.90) per month, per Subscriber until the second anniversary of the Effective Date:

Year 3 - Year 5: The Public Access Channel Grant shall increase to and remain at ONE DOLLAR AND FIVE CENTS ($1.05) per month, per Subscriber until the fifth anniversary of the Effective Date;

Year 6-8: The Public Access Channel Grant shall increase to and remain at ONE DOLLAR AND TWENTY-FIVE CENTS ($1.25) per mouth, per Subscriber until the eighth anniversary of the Effective Date;

Year 9 Forward: The Public Access Channel Grant shall increase to and remain at ONE DOLLAR AND THIRTY CENTS ($1.30) per month, per Subscriber until Time Warner Cable no longer operates under the Franchise Agreement or under any subsequent Temporary Operating Authority authorized by the NYS Public Service Commission.

The per-month, per-Subscriber payments detailed herein will be calculated based on the number of Subscribers to Time Warner Cable Basic Service tier in the Borough. The Public Access Channel Grant payment, along with a brief summary of the Subscriber information upon which it is based certified by a financial representative of Time Warner Cable, shall be delivered to the CAO within forty-five (45) days after the end of each calendar quarter. Time Warner Cable shall file a copy of said statement with DoITT.

2.1.03 Subject to Section 2.5, each Public Access Channel Grant payment shall be non-refundable.

2.1.04 The failure of the CAO to fully allocate or expend any monies provided pursuant to this Section 2.1 shall not affect Time Warner Cable's payment obligations under this Section 2.1.

2.1.05 The other provisions of this Section II notwithstanding, in no event shall the Public Access Channel Grant rate provided by Time Warner Cable per subscriber exceed in any month the Public Access Channel Grant per subscriber rate paid to the CAO by Verizon.

2.2 Cash Grant

2.2.01 Time Warner Cable shall make cash grants to the CAO (each, a "Cash Grant") payable as follows:

> TWO MILLION FIVE HUNDRED THOUSAND DOLLARS ($2,500,000.00) shall be due and payable within thirty (30) days of the Effective Date;
>
> FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) shall be due and payable within thirty (30) days of the first anniversary of the Effective Date;
>
> SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) shall be due and payable within thirty (30) days of the fourth anniversary of the Effective Date; and
>
> SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) shall be due and payable within thirty (30) days of the fifth anniversary of the Effective Date.

2.2.02 Each Cash Grant shall be non-refundable.

2.2.03 The failure of the CAO to fully allocate or expend any monies provided pursuant to this Section

2.2 shall not affect Time Warner Cable's payment obligations under this Section 2.2.

2.3 Use of Funds

Such Public Access Channel Grant and Cash Grant shall be used by the CAO in its discretion for public access costs, including, but not limited to, studio and portable production equipment, editing equipment and program playback equipment, cameras, office equipment, renovation or construction of Public Access Channel facilities, local public access programming development by the CAO, and other public access costs as may be determined by the CAO and its Board of Directors.

* * *

2.8 Additional Obligations of Time Warner Cable

2.8.01 Each Public Access Channel provided in Section 4.2 shall be delivered with transmission quality compliant with all applicable FCC standards and at least the same as the transmission quality of any other channel on Time Warner Cable's tier of service that includes local broadcast channels, provided, however, that Time Warner Cable shall have no responsibility to improve upon or modify the quality of any Public Access Channel's content provided to Time Warner Cable by the CAO.

2.8.02 Subject to the service availability requirements set forth in the Franchise Agreement, Time Warner Cable shall provide to the CAO, without charge, one service outlet activated for Basic Service at each of the following CAO's locations: 537 West 59th Street, New York, New York 10019 and 175 East 104th Street, New York, NY. Cable Service may not be resold or otherwise used in contravention of Time

Warner Cable's rights with third parties respecting programming. Equipment provided by Time Warner Cable, if any, shall be replaced at retail rates if lost, stolen or damaged.

2.8.03 In the event that Time Warner Cable does collect for itself specific standalone public access viewership information, Time Warner Cable may make such specific information available to the CAO at the CAO's cost and expense subject to any limitation of applicable law including, without limitation, 47 U.S.C. §551.

2.8.04 To the extent technically feasible and commercially reasonable, Time Warner Cable shall display Public Access Channel program content titles in electronic on-screen channel listings in the same manner as it designates all other programming on the System; provided, however, that, Time Warner Cable shall not be responsible for any inaccuracies in such information.

2.8.05 In the event Time Warner Cable is required by law or regulation to adhere to technical standards not currently necessary for the production or distribution of the CAO's programming over the System, and such requirement necessitates the acquisition of new equipment not currently contemplated by the parties hereto, Time Warner Cable shall make such equipment available at no cost to the CAO.

2.8.06 Time Warner Cable will provide 100 "avails" or listing of spots each month for the CAO to use for promotional or public interest purposes.

SECTION III - OBLIGATIONS OF THE CAO

3.1 Cash Grant and Public Access Channel Grant; Use for Educational or Charitable Purposes

The CAO shall: (i) administer and manage the Public Access Channels provided for its use by Time Warner Cable and the use of the CAO's facilities, equipment, and supplies in a fair and reasonable manner; and (ii) develop and support programming to be cablecast on the Public Access Channels, which is responsive to the needs and interests of the Residents of the Borough. The CAO shall use the Public Access Channels and the Cash Grant and Public Access Channel Grant provided by Time Warner Cable to the CAO primarily for educational or charitable purposes within the meaning of Section 501(c)(3) of the Code, and as deemed necessary by the Board of Directors of the CAO.

3.2 Maintenance of Tax-Exempt Status

The CAO shall conduct its activities so as to maintain its tax exempt status under Section 501(c)(3) of the Code or other applicable laws.

3.3 Public Access Channel Rules and Regulations

3.3.01 The CAO shall maintain reasonable rules and regulations to provide for open access to Public Access Channel time, facilities, equipment, supplies, and training on a non-discriminatory basis and to the extent required by applicable law. Said rules and regulations providing for open access may dedicate segments of Public Access Channel time and/or specific channels to particular or related subject matters or uses.

3.3.02 If the CAO provides programming grants, it shall establish reasonable rules and regulations

governing the procedure for applying to the CAO) for such grants and the selection of grant recipients by the CAO.

3.3.03 The CAO shall make all rules and regulations publicly available.

* * *

SECTION IV - PUBLIC ACCESS CHANNEL SERVICES

4.1 Compliance with Federal, State and Local Law

Time Warner Cable and the CAO shall comply with all applicable local, state, and federal laws with respect to program content on the Public Access Channels.

4.2 Public Access Channel Set Aside

4.2.01 Time Warner Cable shall carry Public Access Channels as provided in its franchise, including, without limitation, Section 8.16(a) of the Franchise Agreement. Two of such channels shall be carried on Time Warner Cable's system in high definition ("HD") 1080P format. Time Warner Cable shall initially carry the programming on each of the respective Public Access Channels as indicated in Appendix J to the Franchise Agreement. Time Warner Cable shall not arbitrarily or capriciously change such channel assignments and Time Warner Cable shall minimize the number of such changes. However, Time Warner Cable may change such channel assignments as it deems appropriate so long as (i) Time Warner Cable gives the CAO ninety (90) days notice of such change (if commercially practicable) but in no event less than forty-five (45) days, unless the change is required by law and there is no reasonable opportunity to provide such

notice; and (ii) Time Warner Cable provides, free of charge, notice of such changes that shall include (a) to the extent Time Warner Cable has availability, giving notice of such Public Access Channel changes on advertising inserts on local channels carrying non-satellite programming in prime time at least thirty (30) seconds per day, for the time period of thirty (30) to fifteen (15) days prior to such change and two (2) minutes per day for the fourteen (14) days prior to such change (provided, however, that if Time Warner Cable does not have advertising availability at the commencement of the thirty (30) to fifteen (15) day period, as soon as advertising space becomes available, Time Warner Cable shall then provide the advertising contemplated under this Section 4.2.01), and (b) providing notice of such changes in at least two (2) monthly Subscriber bill inserts prior to such change (if commercially practicable) but in no event less than one (1) monthly Subscriber bill insert; provided, however, that such bill inserts shall not be necessary in the event Time Warner Cable provides the requisite notice of such changes to all Subscribers in a letter separate from their bill. If Time Warner Cable changes the channel location of any Public Access channel, the location after such change shall be contiguous with other Public Access channels.

4.2.02 The provisions of 16 NYCRR §895.4 (c)(12) shall apply to this Agreement.

4.2.03 During the term of its franchise, for as long as Time Warner Cable makes video on demand ("VOD") programming available on its system in Manhattan, it will include in the VOD programming available at any given time at least 25 hours of public access programming selected by the CAO, provided such programming is provided to Time Warner Cable by

the CAO in an encoded format so that it can be accessed by Time Warner Cable customers from the VOD platform without further technical or formatting modification by Time Warner Cable. This twenty five hours of public access programming will be available to Time Warner Cable customers at any time, 24 hours per day, seven days a week. It is agreed that this is a designation of channel capacity for public access use but not an offset of the total number of channels required in the Franchise Agreement, Time Warner Cable will provide, upon request and to the extent practical and permitted by law, any aggregate data regarding subscriber use of the CAO's programming on the VOD platform.

* * *

SECTION V - MISCELLANEOUS PROVISIONS

5.1 Effective Date and Term

5.1.01 This Agreement shall take effect on the Effective Date.

5.1.02 This Agreement shall remain in effect throughout the Term of the Franchise Agreement, as provided in the Franchise Agreement, provided that the designation of the CAO by the Borough President remains in effect. The period of time during which this Agreement is in effect shall be "the term of this Agreement." In the event that the Franchise Agreement is terminated for any lawful reason prior to the scheduled expiration of the Term, then the term of this Agreement shall expire and all rights and obligations of the CAO and Time Warner Cable under this Agreement shall cease. Notwithstanding the foregoing, in the event Time Warner Cable continues to provide Cable Service in the Service Area, after the termination or expiration of the Term of the Franchise Agreement

pursuant to any Temporary Operating Authority from the NY Public Service Commission, then Time Warner Cable shall be bound by all of the obligations under this Agreement for the period of such continuing provision of Cable Service in the Service Area.

5.2 Application to Successors

This Agreement shall bind and benefit the parties hereto and their respective heirs, beneficiaries, administrators, executors, receivers, trustees, successors and assigns.

* * *